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Public Law, Private Actors: The Impact of Human Rights on Business Investors in China

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INTRODUCTION¹

The astonishing brutality of Beijing's clampdown on pro-democracy advocates near Tiananmen Square four years ago placed human rights in the forefront of U.S. policy concerns in the People's Republic of China (PRC). Perhaps inevitably, the debate over U.S. human rights policy toward Beijing has had a profound impact on the expanding web of trade and investment between the United States and China—itsself a central concern of U.S. policy. The Tiananmen incident thus wove together two strands of U.S. policy toward the PRC that had previously been thought to be unrelated, raising a raft of complex policy dilemmas to which satisfactory solutions still remain to be fashioned.

The focus of debate has been the annual renewal of China's most-favored-nation (MFN) trade status, but concerns about China's enduring human rights problems have pervaded virtually every aspect of U.S.-China trade and investment relations. However inconsistently enforced, sanctions ranging from a ban on military and high-technology sales to

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¹ A few portions of this article build upon an earlier study by the co-authors which was published by the International League for Human Rights, entitled *GETTING DOWN TO BUSINESS: THE HUMAN RIGHTS RESPONSIBILITIES OF CHINA'S INVESTORS AND TRADE PARTNERS*, July 1992 [hereinafter *GETTING DOWN TO BUSINESS*]. The authors are grateful to Kimberly Y. Beg, Douglas Cahn, Bruce Campbell, Robert H. Dunn, Steven J. Gerber, Michael Jendrzeczyk, John J. Keller, Sidney Jones, James Owens, Elliot Schrage and Michael H. Shuman for their invaluable comments on earlier drafts and for other contributions.

China² to a prohibition on involvement by the Overseas Private Investment Corporation in Chinese projects³ have been used to promote human rights improvements.

But if the most visible debates have centered on U.S. trade and aid policies, a potentially more far-reaching debate is taking place in the boardrooms of corporate America. From Levi Strauss & Co. to Phillips-Van Heusen, from Sears, Roebuck and Co. to Reebok International Ltd., companies are asking how their role as investors can and should be shaped by human rights concerns in the PRC and other countries.

The answers that have emerged from these companies' deliberations reflect a pathbreaking reconception of corporate responsibility—one in which human rights occupy a central place. In March 1992, Sears, Roebuck and Co. announced that it would not import products produced by prison or other involuntary labor in China, and established a monitoring procedure to ensure compliance with its policy. In November 1990, Reebok International Ltd. condemned military repression in China and vowed that it "will not operate under martial law conditions" or "allow any military presence on its premises." Two years later, Reebok adopted a human rights code of conduct governing workplace conditions in all of its overseas operations, including those in China. Phillips-Van Heusen currently threatens to terminate orders from suppliers that violate human rights principles enshrined in its ethical code.⁴ Adopting the most far-reaching policies, Levi Strauss & Co. and the Timberland Company apply human rights criteria in their selection of business partners, and avoid investing at all in countries where there are pervasive violations of basic human rights. In February 1993, the Timberland Company decided to end its sourcing from China. Two months later, Levi Strauss & Co. announced that it would end its relations with business partners in China, and would not initiate any direct investment there.

While these companies are in the vanguard of an emerging trend, their approach to human rights remains exceptional within the business community. Still, their initiatives have presented a bold challenge to the conventional view that business practice and human rights policy should remain largely separate, and have spurred a broader debate about the role of human rights in corporations' overseas investment decisions.

Should companies invest at all in countries, like China, where severe

² Appropriations Act of 1990, Pub. L. No. 101-162, § 610, 103 Stat. 988, 1038 (1989).

³ Foreign Relations Authorization Act, Pub. L. No. 1-1-246, § 902(a)(1)-(2), 104 Stat. 15, 83 (1990).

⁴ John McCormick & Mark Levinson, *The Supply Police: The Demand for Social Responsibility Forces Business to Look Far Beyond its own Front Door*, NEWSWEEK, Feb. 15, 1993, at 48.

human rights abuses are pervasive? If they do invest, should they restrict their operations to areas of the country that have a comparatively good human rights record? Are there basic principles that transnational companies should observe to ensure, at a minimum, that they do not become complicit in a host government's abrogation of universally-recognized human rights? Should such principles be enforced by Executive or congressional fiat, or should companies take primary responsibility for policing themselves? How can companies that wish to factor human rights considerations into their business decisions be assured that they will not pay a price in lost investment opportunities or reduced market share?

This article addresses these questions in light of relevant principles of international law and U.S. foreign policy. A central thesis of this article is that businesses that may or do invest in China bear a responsibility to ensure that their actions do not, however inadvertently, contribute to the systematic denial of human rights in the PRC. We believe, moreover, that international human rights law provides an objective basis for identifying those responsibilities.

We also believe that, in some circumstances, companies that invest in China can and should play a more proactive role in advancing respect for human rights. This view is based, above all, on the unique influence of major foreign investors in China. Today, after a temporary downturn in business activity in the year following the Tiananmen incident, the U.S. business presence in China is at an all-time high. With total committed investment close to six billion dollars, in 1993 the United States is China's second largest foreign investor. In the 1980s, U.S. companies became one of China's top providers of foreign investment, technology and management expertise. Few sectors of U.S. industry are absent, with substantial U.S. investment projects across the length and breadth of the country. Major U.S. petroleum companies have been among the most active in both offshore and onshore exploration, as have the service companies that complement them. In locations from Beijing to Lhasa, from Guangzhou to Xian, U.S. companies manufacture everything from air conditioners to airplanes, from baby food to ball bearings, and from cars to computers. Major U.S. hotel chains are in business as investors, managers or both. U.S. companies involved in business projects in China include numerous household names—Boeing, H.J. Heinz, Coca-Cola, PepsiCo, 3M, Xerox, IBM and AT&T, to name just a few—as well as a large number of smaller companies on and off the Fortune 500 list that have made important commitments to China. Thousands of U.S. managers and company representatives live in China and interact with Chinese business and legal officials on a daily basis.

The importance of this large and growing U.S. presence to China's drive for economic and technical modernization cannot be overestimated. With the renewed ascendancy of the pragmatic, economic reform-oriented elements in the leadership, China is now pressing its economic reform process full speed ahead. To advance that process, the PRC has an overwhelming need for the investment, technology and managerial skills that U.S. business has been providing. U.S. businesses are thus in a unique position to capitalize on their importance to China by upholding basic principles of respect for human rights in their daily business activities in China.

Greater involvement by the U.S. business community in promoting human rights in China is, to be sure, no substitute for the type of leverage that can and should result from well planned and appropriately defined governmental actions. We believe that more effective government policies are essential to an overall strategy for improving China's human rights record. But increasingly, effective government action is likely to include measures that directly affect transnational corporations.

Indeed, a key premise of our analysis is that questions relating to the human rights responsibilities of transnational investors stand at the intersection of public and private spheres of law and policy. The powerful influence of transnational corporations on human rights conditions in the countries where they invest makes it both appropriate, and necessary, to assure that the behavior of these private actors comports with the human rights standards established by public international law and enforced by national law.

While the role of regulatory regimes—national and international—is an important part of any analysis of transnational corporations' human rights responsibilities, effective leadership in defining those responsibilities must come from the business community itself. In this, the challenges will be considerable. How to balance the imperatives of economic growth in a highly competitive international market against the most profound interests of human beings presents dilemmas to which no easy solutions suggest themselves. In the final decade of the Twentieth Century, the business community will be summoned to turn the same ingenuity and commitment that rebuilt Japan and Germany in the postwar years on the equally tortuous challenge presented by a country, like China, that is marred by systematic violations of fundamental rights, and at the same time is in massive need of support in reaching its development and modernization goals. By forging a new cooperation between business and the deepest interests of humanity, America's corporate lead-

ership will continue in the future, as in the past, to promote basic standards of human decency across national borders.

I. HUMAN RIGHTS CONDITIONS IN CHINA AND THE U.S. RESPONSE

The current debate over corporate responsibility *vis-a-vis* human rights in China has been driven by three principal developments: 1) the persistence of systematic violations of basic rights in the PRC since the June 1989 crackdown near Tiananmen Square; 2) the inadequacy of U.S., as well as multilateral, sanctions in addressing those violations; and 3) the surge in U.S. business investment in China in recent years, and the correspondingly significant leverage that U.S. businesses have to promote improvements in China's human rights record. With violations persisting on a massive scale, U.S. companies that have substantial investments in China are being pressed to account for the human rights consequences of their China operations.

A. Human Rights Conditions in the PRC

Four years after the Tiananmen tragedy, the human rights situation in the PRC remains critical. Despite repeated pronouncements by Chinese officials that the cases of individuals involved in the Tiananmen affair have "basically been resolved,"⁵ political trials of dissident figures involved in the 1989 events, Tibetan independence advocates, religious figures and other political offenders apprehended for reasons unrelated to Tiananmen have continued at a steady pace in the past year. Their trials have been characterized by repeated violations of China's own legal procedures as well as international standards of due process and fair trial procedures.⁶

Reports of maltreatment and torture of prisoners detained in China are widely documented. Severe restrictions on freedoms of expression

⁵ Nicholas D. Kristof, *China is Reported to Plan Release of Some Political Prisoners Soon*, N.Y. TIMES, May 6, 1992, at A12. On February 17, 1993, Tiananmen student leaders Wang Dan and Guo Haifang were released from prison, both having served their full terms. The PRC government claimed that these releases left no "students" in prison from the Tiananmen incident, a claim that appeared to be patently untrue in light of information gathered by the human rights organization Asia Watch, and in any event is misleading in view of the large number of prisoners of conscience other than students—workers, intellectuals and others—who remain detained in the PRC for activities during and long after the 1989 events. See ASIA WATCH, HUMAN RIGHTS WATCH, ECONOMIC REFORM, POLITICAL REPRESSION: ARRESTS OF DISSIDENTS IN CHINA SINCE MID-1992 (1993) [hereinafter MAR. 1993 ASIA WATCH REPORT]; *Chinese Confirm Two Pro-Democracy Student Leaders Still in Jail*, ASSOCIATED PRESS, Feb. 26, 1993, available in LEXIS, Nexis Library, AP File.

⁶ See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRIMINAL JUSTICE WITH CHINESE CHARACTERISTICS: CHINA'S CRIMINAL PROCESS AND VIOLATIONS OF HUMAN RIGHTS (1993) [hereinafter LAWYERS COMMITTEE REPORT].

and association guaranteed by the Chinese Constitution remain the order of the day. So, too, do lengthy periods of incommunicado administrative detention, not subject to any formal legal procedures, for those who challenge the political orthodoxy. Documentation of the extensive use of prison labor, operating under dismal conditions to produce profitable export goods, has focused attention on still another highly disturbing dimension of China's human rights situation.

Other human rights violations that have been particularly pronounced during the past several years have included the persecution of individuals for the exercise of religious freedom (guaranteed by the PRC's Constitution⁷) and the suppression of emerging expressions of minority rights in Tibet and other "autonomous regions" of China. On the religious front, the past few years have seen an intensification of the PRC authorities' crackdown on independent religious groups, Christian, Buddhist and Muslim, that refuse to practice their religion through official government-supervised bodies.⁸ In Tibet there has been no let-up, and even some intensification, of the persecution of peaceful advocates of independence as well as those engaged in religious and cultural activities that threaten the dominance of PRC state control.⁹ A major crackdown has also been underway in Inner Mongolia, where the authorities have disbanded associations formed to promote Mongolian language and culture and arrested peaceful advocates of greater ethnic rights for Mongolians in this "autonomous region" of China.¹⁰

The past few years have seen a newfound willingness of the Chinese government to engage in a measure of dialogue and exchange with foreign countries on human rights issues. The government has allowed a number of delegations from Australia, France, Britain and other countries to visit China on human rights missions in the past two years. These groups have, however, been hampered by limitations on contacts with individual dissidents and restricted access to judicial and prison facilities. They have had extensive discussions with relevant Chinese agencies about human rights issues, and in some cases have issued detailed

⁷ XIANFA [Constitution] arts. 4, 36, 48 (P.R.C.).

⁸ ASIA WATCH, HUMAN RIGHTS WATCH, *FREEDOM OF RELIGION IN CHINA* (1992); ASIA WATCH, HUMAN RIGHTS WATCH, *CONTINUING RELIGIOUS REPRESSION IN CHINA* (1993).

⁹ AMNESTY INTERNATIONAL, *People's Republic of China: Repression in Tibet*, AI Index: ASA 17/19/92, May 1992. See also INTERNATIONAL LEAGUE FOR HUMAN RIGHTS, *HUMAN RIGHTS VIOLATIONS IN TIBET*, submitted to the Secretary General of the United Nations, Jan. 1992, reprinted in *Situation in Tibet: Note by the Secretary-General*, U.N. Doc. E/CN.4/1992/37, at 50; Nicholas D. Kristof, *Communist Party Chief Calls for a Purge in Tibet*, N.Y. TIMES, Feb. 14, 1993, at 11.

¹⁰ ASIA WATCH, HUMAN RIGHTS WATCH, *CRACKDOWN IN INNER MONGOLIA* (1991); ASIA WATCH, HUMAN RIGHTS WATCH, *CONTINUING CRACKDOWN IN INNER MONGOLIA* (1992).

and highly critical reports. The Chinese government, for its part, sent two academically oriented groups to the United States in the last quarter of 1991, and also sent groups to several European and Asian countries in 1992, to discuss human rights with academic bodies, human rights organizations, and members of the legislative and executive branches in those countries.

These initial efforts to address human rights questions through contacts and discussion are highly preferable to the previous approach of the Chinese government, which was to reject out of hand human rights as an issue for bilateral or international debate. But while the government has engaged in some measure of discussion of human rights, it continues both to deny that well-documented violations occur in China, and to reassert its position that China's domestic human rights record is an internal affair not subject to outside action. In November 1991, the PRC State Council issued a "Human Rights White Paper" that attempts, through a variety of techniques ranging from propagandistic rhetoric to outright distortion, to paint China as not only a leader in the guarantee of economic and social rights for its citizens but as a country where the criminal justice system, the policy toward religious believers and minority groups and other policies fully protect human rights.¹¹ This report was followed by two similar reports on the treatment of prisoners and the situation in Tibet.¹²

The approach taken by Premier Li Peng in his January 31, 1992 speech to the U.N. Security Council and by the Chinese delegation at the past several sessions of the U.N. Commission on Human Rights was to express a willingness for dialogue on human rights "on an equal footing" and up to a certain point, but to reject any criticism of human rights conditions in any country—including China's own practices in Tibet and elsewhere—as "interference in internal affairs" and a violation of state sovereignty.¹³ The PRC continued to press this position at the June 1993 World Conference on Human Rights in Vienna.¹⁴

¹¹ Information Office of the People's Republic of China State Council, *Human Rights White Paper*, English translation in FBIS-CHI-91-225-S, Nov. 21, 1991, Chapters III, VI-VIII. For a critique of the White Paper's discussion of the Chinese criminal justice system, see LAWYER'S COMMITTEE FOR HUMAN RIGHTS, CHINA'S WHITE PAPER ON HUMAN RIGHTS: A CRITIQUE OF CHAPTER 4 ON GUARANTEES OF HUMAN RIGHTS IN CHINA'S JUDICIAL WORK (1992).

¹² See generally Information Office of the PRC State Council, *Criminal Reform in China*, Aug. 1992; Information Office of the PRC State Council, *Tibet—Its Ownership and Human Rights Situation*, Sept. 1992, English translation in FBIS-CHI-92-197-S, Oct. 9, 1992.

¹³ U.N. ESCOR, 4th Sess., 3046th mtg. at 92-93, U.N. Doc. S/PV.3046 (prov. ed. 1992). See Zhang Zhengdong, *Unjust Cause Finds Little Support*, BEIJING REV., Mar. 22-23, 1993, at 10.

¹⁴ See Zhou Qingchang, *Western Views on Human Rights Opposed*, BEIJING REV., July 5-11,

B. The United States Response

Daily violations of human rights in China continue to evoke condemnation and concern in the United States and elsewhere. Despite concerted efforts by the PRC government to shed its pariah status, its human rights record remains a prominent concern of U.S. policy and a barrier to China's full partnership in the community of nations. When, for example, Beijing launched a massive campaign to be selected as host of the 2000 Olympics, U.S. Senator Bill Bradley (D-N.J.) mobilized Senate opposition,¹⁵ and the House overwhelmingly adopted a resolution urging the U.S. member of the International Olympic Committee to deny China's bid.¹⁶ But while human rights pressure has elicited some positive responses from Beijing, such as the periodic release of prominent political prisoners, the international community's response to ongoing violations in China has thus far been ineffective in ending broad patterns of abuse.

1. "Constructive Engagement": The Bush Administration

This was notably true of the Bush Administration's policy of renewing political and economic ties with the PRC that had been suspended following the Tiananmen incident, relying on what it termed "a constructive policy of engagement with China" to address human rights concerns.¹⁷ Then Secretary of State James Baker was acting in accordance with that policy when, in November 1991, he visited China. The circumstances surrounding Secretary Baker's visit seemed to underline the inadequacy of the Bush Administration's China policy. Flouting the U.S. government's asserted concern for human rights, the Chinese government detained two leading Chinese activists, Hou Xiaotian and journalist Dai Qing, to prevent them from meeting with the Secretary or his staff during their visit. Although Dai Qing was subsequently allowed to travel to the United States, she was temporarily prevented from reentering China when she sought to return home on May 30, 1992.¹⁸

1993, at 8; *Proposals for Human Rights Protection and Promotion*, BEIJING REV., June 28-July 4, 1993, at 8.

¹⁵ See Lena H. Sun, *China Pulls Out Stops in Olympic Bid: Political Factors Dominate in Beijing Try for 2000 Games, With Chances Uncertain*, WASH. POST, July 15, 1993, at D7.

¹⁶ Nicholas D. Kristof, *Whither that Torch? China's Burning to Have It*, N.Y. TIMES, July 28, 1993, at A4.

¹⁷ Thomas L. Friedman, *Bush Seeks Trade Benefits for China*, N.Y. TIMES, June 3, 1992, at A13.

¹⁸ Ms. Dai was allowed to return to China on June 7, 1992, to return to the United States in August 1992 and then to return permanently to China in early 1993. But the PRC apparently intends to continue to deny reentry to other dissidents who travel abroad. A December 1992 document issued internally by the PRC State Council reportedly establishes a blacklist of political dissi-

While Secretary Baker raised human rights concerns during his visit, he left with little in the way of concrete improvements to show for his efforts. Although the Chinese government promised to stop exports to the United States of prisoner-produced goods, it was subsequently caught violating that pledge.¹⁹ And while the government did produce a promised accounting for some 800 political prisoners, it "provided just the barest of information on each one, some of which has been proven incorrect," according to congressional officials cited by *The New York Times*.²⁰

Bush Administration officials acknowledged that Chinese authorities made little progress in human rights in response to the Administration's efforts, and, according to *The New York Times*, "have taken actions that almost seemed designed to 'rub our noses in it,' as one official put it."²¹ Nonetheless, the policy of "constructive engagement" was continued by President Bush through the end of his presidency.

2. Enforcement of Ban on Products Produced by Prisoners

The revelation in April 1991 that China was using prison labor on a significant scale to generate export earnings was a major factor in reviving attention, both in the United States and elsewhere, to China's continuing violations of human rights. In the United States, this issue raised a legal problem under the provisions of a 1930 statute, the Smoot-Hawley Tariff Act, which prohibits the import into the United States of products of convict labor,²² and provided an important focus of debate on most-favored-nation status for China's exports to the U.S. in the past two years.²³ Prompted by these revelations, the U.S. Customs Administration initiated an investigation into the prison labor allegations. In the course of this investigation, specific Chinese products known to be produced with prison labor were barred from entering the United States.

In the wake of Secretary Baker's November 1991 visit to Beijing, it was announced that the United States and China had reached basic agreement on a memorandum of understanding that would allow the U.S. Customs Service to make inspections in China to assure that products being exported to the U.S. were not produced with prison labor. It

dents who will not be allowed to reenter China after traveling abroad. Kang Tieshang, *Banishment and Exile: New Tactics for Dealing with Dissidents*, CHINA F., Mar. 30, 1993, at 5.

¹⁹ See *Bush is Setting the Bloodhounds on Beijing*, BUS. WEEK, Dec. 23, 1991, at 36.

²⁰ Friedman, *supra* note 17, at A13. See also ASIA WATCH, HUMAN RIGHTS WATCH, EVIDENCE OF CRACKDOWN ON LABOR MOVEMENT MOUNTS (1992).

²¹ Friedman, *supra* note 17.

²² (Smoot-Hawley) Tariff Act of 1930, 19 U.S.C. § 1307 (1988).

²³ See discussion *infra* part I.B.4.

took another nine months before the agreement was actually signed, however, and in the period since then Chinese authorities have allowed U.S. Customs officials limited access to a handful of prison factories, vitiating the possibility of meaningfully monitoring compliance.²⁴

3. *The Congressional Challenge*

During the Bush presidency Congress sought to invigorate U.S. human rights policy toward China by imposing sanctions more stringent than those adopted by the Administration.²⁵ But President Bush repeatedly thwarted these efforts by using his veto power to block key legislation and by making liberal use of the presidential waiver authority built into laws that Congress had enacted.²⁶ Still, the very threat of legislated sanctions elicited some human rights concessions from Beijing—notably including the release of prominent political prisoners during key periods of congressional debate—and concerned legislators helped maintain public attention to human rights conditions in China. In larger perspective, Congress' past efforts to fortify U.S. human rights policy toward China laid the groundwork for a more constructive Executive policy under the Clinton Administration, the basic contours of which are examined below. Further, by forcing President Bush to justify his opposition, those initiatives triggered a rich public debate about U.S. human rights policy toward China.

One of the most significant results of that debate has been a reexamination of the relationship between human rights concerns and U.S. trade policy. Congress has sought to promote human rights in China by harnessing the potentially powerful leverage available by virtue of the United States' importance to China as its major trading partner. Inevitably, these efforts have drawn the U.S.-based business community into public debate about U.S. human rights policy toward China, and that community has emerged as a singularly important voice in the debate.

4. *Most Favored Nation Trading Status*

The most visible and important congressional initiatives have focused on the annual determination about renewal of the PRC's most-favored-nation (MFN) trading status, which gives China the lowest possible tariffs on its exports to the United States.²⁷ Several factors have

²⁴ Mike Jendrzeczyk, *No Waffling on China*, WASH. POST, Feb. 16, 1993, at A13 (opinion piece).

²⁵ For analysis of those sanctions, see GETTING DOWN TO BUSINESS, *supra* note 1.

²⁶ For discussion of the latter, see GETTING DOWN TO BUSINESS, *supra* note 1.

²⁷ Pursuant to a 1975 law, § 402 of the Trade Act of 1974, the President may not extend MFN

elevated the importance of MFN status in the overall debate about U.S. policy toward the PRC. First, the granting of MFN status is far and away the most significant economic lever available to the U.S. government to promote human rights in the PRC. The United States is China's largest overseas market, giving China a surplus of some \$18 billion in its trade with the United States in 1992.²⁸ The loss of MFN status would thus have a substantial impact on China's exports. Second, the U.S. business community regards continuation of China's MFN status as vital to its own economic interests. In its view, China's MFN status is the keystone of the U.S.-China economic relationship, and U.S. companies fear that nonrenewal of that status would imperil their access to China's vast and expanding market, as well as the continuation of investment and other business opportunities in China. In consequence, the U.S. business community has mobilized strong opposition to both congressional and Executive efforts that could threaten continuation of China's MFN status. Third, by law the President is required to notify Congress whether he plans to renew China's MFN status on June 3 of each year—almost to the day the anniversary of the massacre near Tiananmen Square.²⁹ This coincidence has, together with the first two factors, lent special prominence to the annual debate over continuation of China's MFN status.

a. President Bush's Policy and Congressional Initiatives

In each year of his presidency following the Tiananmen incident, President Bush notified Congress of his intention unconditionally to renew China's MFN status. Each time, his stance triggered congressional efforts to link renewal to human rights improvements in the PRC. But while the resulting clash between Congress and the Executive focused public attention on deficiencies in the Administration's China policy, President Bush was able each year to secure unconditional renewal of China's MFN status despite congressional opposition. In 1990, the

status to countries with non-market economies that deny their citizens "the right or opportunity to emigrate." 19 U.S.C. § 2432 (commonly referred to as the Jackson-Vanik amendment to the Trade Act of 1974). The President may waive this restriction if a waiver would "lead substantially to the achievement of the objectives" of the law. The first provision of the law asserts that its object is "[t]o assure the continued dedication of the United States to fundamental human rights," and MFN determinations have sometimes taken into consideration human rights considerations unrelated to emigration. Although China does not allow free emigration, the U.S. government has waived the Jackson-Vanik restriction since 1980.

²⁸ Daniel Southerland, *Clinton Sending First Trade Delegation to China*, WASH. POST, Feb. 27, 1993, at C1.

²⁹ The violent assault on pro-democracy activists in Beijing began on the night of June 3, 1989, and continued through June 4. Most of the killings occurred on June 4, 1989, and the incident is now widely referred to in China simply as "June 4."

House passed two bills, one denying China MFN status and the other extending MFN until 1991, with renewal then conditioned on the satisfaction of strong human rights standards. The Senate did not consider either bill before adjourning. In 1991 and in the Spring of 1992, both the House and Senate enacted legislation attaching human rights conditions to renewal of China's MFN status. But the Senate version failed to marshal enough votes to override a presidential veto, issued in keeping with the Bush Administration's "constructive engagement" policy.

In the Summer of 1992, several congressional leaders sought to break the MFN impasse by introducing refined versions of earlier proposals to attach human rights conditions. Following President Bush's announcement on June 2, 1992 that he planned to extend MFN status to China for another year, a modified version of a proposal developed by the human rights organization Asia Watch was introduced by Rep. Nancy Pelosi (D.-California) and Rep. Don Pease (D.-Ohio) in the House of Representatives and by Majority Leader George J. Mitchell (D.-Maine) in the Senate. Each of these Congresspersons had been chief architects of the conditional approach to MFN in the past. The initiative abandoned the "all or nothing" approach built into existing MFN legislation, which had forced Congress to choose between unconditional renewal of MFN on the one hand and, on the other, non-renewal or renewal with conditions that would apply across the board—requiring penalization of China's reform-oriented privatizing economic sectors along with all others. The legislation sought to impose measurable and effective human rights conditions—the release of political prisoners, an end to religious persecution, and the like. China's failure to meet such conditions would result in the loss of MFN benefits only for exports of PRC state enterprises, from which the repressive regime derives the most significant benefit.³⁰

Under these bills, exports that could be demonstrated to emanate from non-state enterprises—private businesses, collectives, and enterprises with foreign investment—would not lose the trade benefits. The legislation thus sought to penalize the government for failing to improve the human rights situation, while minimizing the risk of harming sectors of China's economy and society that contribute to liberalization. Significantly, too, this approach addressed one basis for opposition within the

³⁰ Although economic authority in the PRC has become significantly diffused and products whose export is monopolized by one particular state agency have diminished in number and in percentage of China's trade, state enterprises at one level or another of the Chinese trade structure—whether central or local—still account for a significant proportion of China's exports to the United States and other countries. *See generally* NICHOLAS R. LARDY, *FOREIGN TRADE AND ECONOMIC REFORM IN CHINA, 1978-1990* (1992).

business community to earlier efforts to attach human rights conditions to MFN renewal—the potential loss of tariff benefits for products produced by joint ventures between U.S. and Chinese businesses. Like its predecessors, this legislative initiative passed both the House and Senate but failed in the Senate to override President Bush's September 28, 1992 veto by a margin of seven votes.³¹

On April 21, 1993, Congresswoman Pelosi and Senator Mitchell introduced in the House and Senate, respectively, bills patterned on the legislation they had introduced last year, with various technical refinements. Under this legislation, failure by the PRC to meet specific human rights conditions would result the following year in denial of MFN treatment to Chinese state enterprise products. The proposed human rights conditions included continued release of Chinese citizens detained as a result of nonviolent expression of political and/or religious beliefs, unrestricted immigration of PRC citizens desiring to leave China for political, religious or other valid reasons, and compliance by China with the August 7, 1992 Memorandum of Undertaking on Prohibiting Import and Export Trade in Prison Labor Products.³²

b. President Clinton's Executive Order

By the time these bills were introduced, a new Administration had taken office. Although President Clinton had not yet made known what action he would take on renewal of China's MFN status, it seemed likely that he would reverse his predecessor's policy of unconditional renewal. As a presidential candidate, Bill Clinton had indicated that he was likely to support some form of human rights conditionality.³³ During the early months of the Clinton presidency, key members of his administration repeatedly indicated the President's intention to link continued MFN treatment to human rights improvements in China.³⁴

³¹ The Senate voted to sustain President Bush's veto by a count of 59-40 on Oct. 1, 1992. 138 CONG. REC. S15957 (daily ed. Oct. 1, 1992).

³² 139 CONG. REC. S4662, H2023 (daily ed. Apr. 22, 1993).

³³ See Jendrzejczyk, *supra* note 24.

³⁴ In his first congressional testimony after being confirmed as U.S. Trade Representative, Mickey Kantor noted the repeated failure of the Bush Administration to impose conditions on renewal of MFN for China, and stated that "the Clinton Administration will address all of these concerns — human rights, [arms] proliferation, and trade — and we will address them aggressively." Michael Chugani, *U.S. Takes Tough Stand on Trade*, S. CHINA MORNING POST, Mar. 11, 1993, at 2. Secretary of State Warren Christopher told a congressional committee in March that "it is my hope that we can go forward with MFN this year but conditioned on [China] making very substantial progress." Michael Chugani, *U.S. Spells Out MFN Renewal Conditions*, S. CHINA MORNING POST, Mar. 12, 1993, at 2. In his Senate confirmation hearing, Assistant Secretary of State for East Asia and Pacific Affairs Winston Lord said that "conditional MFN is the position of the President and we

On May 28, 1993, President Clinton issued an Executive Order that continued China's MFN status for another year, but set forth human rights conditions that China would have to satisfy to qualify for renewal in 1994. The Executive Order identifies seven human rights criteria relevant to the renewal determination. Only two are cast as absolute requirements, and both of these criteria relate to preexisting requirements of U.S. law. The first, that renewal "will substantially promote the freedom of emigration objectives" of the Trade Act of 1974, in effect restates the criterion for renewal of China's MFN status already imposed by that law.³⁵ The second, that "China is complying with the 1992 bilateral agreement between the United States and China concerning prison labor," by its terms incorporates a preexisting commitment, which in turn implements the Smoot-Hawley law discussed in Part I.B.2. China is required to demonstrate only "overall, significant progress" in meeting the other five criteria, which relate to such goals as the release of political prisoners and access of international humanitarian agencies to PRC prisons.

Against a recent history of assurance to Chinese leaders that, whatever Congress may say or do, the U.S. President will stand by them, the MFN conditionality imposed by President Clinton signals a serious U.S. intention to demand meaningful human rights improvements in exchange for continued trade privileges, despite the generality with which the human rights conditions are expressed in the Order. At the same time, the leader-to-leader approach also is better suited to the type of flexibility that may be necessary in addressing the complex issues that are sure to arise during implementation of a conditional MFN approach. But if presidentially-mandated conditionality is preferable, it remains desirable for Congress to sustain pressure to move the Administration clearly in the direction to which the Executive Order points.³⁶ Whether the policy established in President Clinton's Order is effective will depend, above all, on actions taken by the Administration in the months ahead. In particular, the Administration should communicate to Chinese authorities clear standards by which the PRC's compliance with the Executive Order criteria will be evaluated, and should actively press for progress in satisfying those standards. Further, as elaborated below, the Executive Order opens a unique window of opportunity for the Adminis-

wish to go forward on that basis, depending on events." Susumu Awanohara, *China Consensus*, FAR E. ECON. REV., Apr. 22, 1993, at 13.

³⁵ See *supra* note 27.

³⁶ Congress has made clear its support for President Clinton's initiative by overwhelmingly voting against a bill that would have superseded the Executive Order and immediately terminated China's MFN status. H.R.J. Res. 208, 103d Cong., 1st Sess. (1993).

tration to mobilize U.S. investors in China to act as a constructive force for human rights progress.

c. The Role of the Business Community

While views within the business community have not been monolithic, U.S. companies that invest in China have, on the whole, strongly opposed efforts to attach human rights conditions to renewal of China's MFN status. The loss of MFN status would directly affect some U.S. companies engaged in joint venture operations in China, resulting in some cases in a multi-fold increase in tariffs for joint-venture products destined for a U.S. market. But the chief concern of U.S. companies is that termination of China's MFN status would provoke retaliation against U.S. companies that invest in and send exports to China. U.S. companies have already experienced significant difficulties penetrating the China market when faced with competition from exporters in Japan and Europe, who enjoy a substantial advantage by virtue of their governments' export-assistance programs and often more flexible pricing policies. U.S. companies fear that political tension between China and the United States could only exacerbate these endemic commercial problems.

Demonstrating a sophisticated grasp of the U.S. political process, the PRC government exploited these apprehensions in the period preceding President Clinton's decision about renewal of China's MFN status. As the MFN debate approached, Chinese trade delegations went on a buying frenzy throughout the United States, spending more than \$800 million for jetliners, \$160 million for cars, and \$200 million for oil exploration equipment. After years of favoring French and other non-American telecommunications companies for entry into this key part of the China market, the PRC concluded a major agreement with AT&T, worth several billion dollars, for telecommunications equipment and technology. China reached a tentative agreement with Hughes Space Communications Co. to build communications satellites worth \$750 million. Though characteristically frugal, Chinese representatives offered to buy U.S. steel at slightly higher prices than those charged in Japan and Korea.³⁷ Throughout this process, China made it clear that it expected U.S. companies to lobby for continuation of its MFN status in return for its purchases. U.S. companies are "regularly threatened with cancellation of orders or loss of future deals if China loses its preferred status," according to business sources cited in *The Washington Post*.³⁸ The

³⁷ Michael Weisskopf, *Backbone of the New China Lobby: U.S. Firms*, WASH. POST, June 14, 1993, at A12.

³⁸ *Id.*

message was not lost on U.S. companies, who mounted a campaign of unprecedented scope and intensity to secure unconditional renewal of China's MFN status in the period leading up to President Clinton's determination on this issue.

By letter dated May 12, 1993, some 370 companies and business associations, representing virtually every U.S. company active in China, stated their case to President Clinton:

. . . .We represent companies that exported products to China worth nearly \$7.5 billion in 1992, and that employ an estimated 157,000 American workers producing those goods. We represent the aerospace industry which exported products to China worth over \$2 billion in 1992, and which expects China to purchase approximately \$40 billion in new aircraft over the next twenty years. We represent the farmers whose largest market for wheat is China. . . .America's economic stake in maintaining trade relations with China is high. Withdrawing or placing further conditions on MFN could terminate the large potential benefits of the trading relationship, lead the Chinese to engage in retaliatory actions that would harm U.S. exporters, farmers, laborers and consumers. . . .³⁹

But while emphasizing U.S. economic stakes, the signatories to this letter endorsed the human rights goals of the Clinton Administration's policy toward Beijing. Echoing arguments by spokesmen for business interests that had become increasingly common during previous debates about renewal of China's MFN status, they asserted:

We in the business community . . . believe that our continued commercial interaction fuels positive elements for change in Chinese society. The expansion of trade and free market reforms has strengthened the pro-democratic forces in China. . . .⁴⁰

Significantly, the letter expressed agreement with the President "that the Chinese must continue to make progress in . . . human rights."⁴¹

However much the business community may have hoped to avoid MFN conditionality, it now has a substantial interest in assuring that China makes sufficient progress on human rights to avoid termination of its MFN status in 1994. In this setting, U.S. policy would be most effective if the political leadership in Washington actively encouraged U.S. investors in China to promote human rights there. The Administration should build on the asserted commitment to its human rights goals expressed in the above-quoted letter by urging the signatories actively to promote human rights progress in China. While some Administration

³⁹ Letter from Business Coalition for U.S.-China Trade to President Bill Clinton (May 12, 1993), at 1-2.

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

officials have already done so in general terms,⁴² these efforts would be most effective if those same officials developed concrete proposals for measures that U.S. companies can take to promote human rights in China, and urged the chief executive officers of major U.S. investors to undertake those measures or others more suited to the nature of their business relationships in the PRC.

5. *Code of Conduct Legislation*

While MFN conditionality has dominated the U.S. human rights policy debate about China, a little-noticed legislative initiative has introduced a new, and potentially vital, plank in the policy options. Senator Edward Kennedy (D-Massachusetts) and Representative Jolene Unsoeld (D-Washington) have agreed to sponsor bills, in the Senate and House respectively, to establish a voluntary code of conduct governing the Chinese operations of U.S. companies. By directly focusing on the role of U.S. corporations in addressing human rights concerns in China, this legislation sharpens the broader debate about corporate responsibility vis-à-vis human rights violations in the PRC.

a. Background and Overview

The Kennedy and Unsoeld initiatives build upon a similar effort by then-Congressman John Miller (R.-Washington), who on June 21, 1991, introduced legislation⁴³ that would have established a set of human rights principles governing the conduct of U.S. companies with investments and other business operations in the PRC. On October 30, 1991, the bill passed the House as part of the Omnibus Export Amendment Act of 1991 and was subsequently taken up in a joint House-Senate conference. A conference bill passed the Senate on October 8, 1992, but failed to come to a vote in the House for reasons unrelated to the code of conduct itself. The discussion that follows is based upon the original Miller bill.⁴⁴

The proposed code-of-conduct bill does not seek to impose sanctions

⁴² During a briefing on the Executive Order, the Assistant Secretary of State for East Asian and Pacific Affairs, Winston Lord, said "[i]t would be very helpful indeed if the business community lobbied the Chinese government to make progress in these areas as effectively as they are lobbying Congress and the President. I think it would help American policy . . . [if U.S. business leaders] would take actions and express their views to the Chinese on human rights concerns. . . ." Winston Lord, *Most Favored Nation Trading Status to China*, May 28, 1993, available in LEXIS, Nexis Library, Reuter Transcript Report File (State Department on-the-Record Briefing).

⁴³ H.R. 3489, 102d Cong., 1st Sess. (1991).

⁴⁴ It is the authors' understanding that the offices of both Senator Kennedy and Representative Unsoeld are likely to introduce legislation patterned on the original Miller bill.

on China for failing to meet human rights standards, nor does it discourage U.S. businesses from investing in China. Instead, the bill asks companies with a significant presence in China to adhere to a set of basic human rights principles, on a "best efforts" basis, in the course of their operations.

In this way, the proposed law seeks to assure that U.S. business activities in the PRC do not inadvertently encourage or themselves contribute to repressive practices, but instead make a constructive contribution to human rights. Under the proposed law, these goals would be promoted by encouraging U.S. nationals conducting industrial cooperation projects in China to adhere to nine principles that have the cumulative effect of (1) assuring that U.S. businesses operating in China extend to their foreign employees the same type of minimum human rights protections that they have long been required to provide to employees in the United States, such as protections against discrimination on the basis of religious beliefs, political views, gender and ethnic or national background; (2) assuring that the premises of U.S. business operations are not used in a fashion that violates fundamental rights (for example, the proposed code of conduct includes a pledge to discourage compulsory political indoctrination programs from taking place on the premises of U.S. nationals' industrial cooperation projects in the PRC); and (3) bringing the considerable—and indeed unique—influence of the U.S. business community to bear to promote an end to flagrant violations of human rights (for example, the proposed code of conduct urges U.S. nationals to use their access to Chinese officials informally to raise cases of individuals detained solely because of their nonviolent expression of political views).⁴⁵

There are no penalties for failure to comply with the principles, and in this respect compliance with the code depends upon the voluntary efforts of U.S. companies. The bill itself is framed as a "sense of Congress

⁴⁵ Somewhat analogous codes have been developed to promote human rights in other countries. The best known of these are the Sullivan Principles for businesses operating in South Africa. First developed in 1977 and subsequently amplified, the Sullivan Principles were for many years adopted by corporations on a voluntary basis. In 1985, President Reagan issued an executive order that included a provision forbidding U.S. export assistance to any U.S. firm with 25 or more employees that had not adopted the principles enumerated in the Sullivan code. The Anti-Apartheid Act of 1986, which superseded President Reagan's executive order, incorporated the Sullivan Principles by, *inter alia*, requiring "[a]ny national of the United States that employs more than 25 persons in South Africa [to] take the necessary steps to insure that the Code of Conduct [based on the Sullivan Principles] is implemented with respect to the employment of those persons." Comprehensive Anti-Apartheid Act of 1986 § 207(a), 22 U.S.C. § 5034(a) (1988). Another precedent is the MacBride Principles, which set forth employment standards for companies operating in Northern Ireland. A number of city and state governments have enacted laws supporting the MacBride Principles (by, for example, threatening to bar firms that do not adhere to the Principles from city contracts).

that any United States economic cooperation project in the People's Republic of China or Tibet should adhere to." "Adherence" is defined as "agreeing to implement the principles set forth" in the bill, "implementing those principles by taking good faith measures with respect to each such principle," and "reporting accurately to the Department of State on the measures taken to implement those principles."

The bill imposes only two "requirements" on U.S. companies: 1) the U.S. parent company of a PRC investment project must register with the Secretary of State and indicate whether it will implement the principles; and 2) the parent company must report on an annual basis to the Department of State describing the China project's adherence to the code. The Secretary of State is directed to review these reports to determine whether the project is adhering to the principles, and may request additional information to supplement company reports. The Secretary is further required to submit an annual report to Congress and the Secretariat of the Organization for Economic Cooperation and Development (OECD) describing the level of adherence to the principles by U.S. company projects in China.⁴⁶

The code-of-conduct bill sets forth a constructive approach to what has often seemed an intractable problem of competing policy goals. In effect, the bill takes up the claim of the U.S. business community, repeatedly asserted in the context of annual debates over renewal of China's MFN status, that U.S. corporations can more effectively promote human rights improvements in China by remaining an active presence there than by severing or contracting ties. By encouraging U.S. corporations to adhere to basic human rights principles in China, the proposed law seeks to assure that U.S. investment does in fact have a constructive impact on human rights in China. At the same time, the bill would assure that U.S. investment in China does not undermine U.S. human rights goals by inadvertently lending support to the PRC government's ongoing violations of fundamental rights.

Nevertheless, while some members of the U.S. business community have expressed support for the principles established in the legislation, many others have spoken out against it. The critics have raised two principal objections. The first, in essence, is that Congress should not dictate business practices to U.S. companies operating in China, and that the latter should not appear to be the "lackeys" of U.S. policy. According to one press account, a letter to U.S. Congresspersons from the American

⁴⁶ The Secretary is also directed to encourage OECD nations to promote similar principles. An international approach to business efforts on human rights is essential if such efforts are to achieve meaningful success. See discussion *infra* part III.C.

Chamber of Commerce in Hong Kong charged that the bill “practically [makes U.S. business] appear to be agents of the U.S. government.”⁴⁷

In response to this concern, U.S. businessman John Kamm, a former Chairman of the American Chamber of Commerce in Hong Kong, approached the Chamber with a proposal for it to adopt the legislation’s principles on a voluntary basis. Similarly, the office of Congressman Miller, who introduced the original version of the code-of-conduct legislation, held discussions with the U.S.-China Business Council in Washington, the leading U.S. organization representing U.S. investors in China, about the possibility of the Council’s taking a similar step. In each case, business groups were urged to avoid congressionally-legislated principles by adopting similar principles themselves. None of these efforts has met with success, however. Instead, both the Chamber and the U.S.-China Business Council have raised numerous objections to the principles on substantive grounds.

The general tenor of substantive objections by members of the business community is that the code would require U.S. companies to take action that may be “impractical” or provocative, and that could jeopardize their position in China. This line of objection, which is more pronounced with respect to some provisions of the code than others, has often been backed by the claim that compliance with the bill’s principles would require U.S. companies to violate Chinese law or policy.

A close examination of the proposed legislation suggests that these concerns are unwarranted. As detailed in the following section-by-section analysis of the code-of-conduct bill, nothing in the bill requires U.S. companies to violate Chinese law. Further, the bill grants companies wide leeway to avoid taking action that could imperil their business relationships in China, urging only that they endeavor, on a “best efforts” basis, to comply with and promote basic international standards in their Chinese operations.

b. Section-by-Section Analysis of Proposed Legislation

(1) Pursuant to Section 941(b)(1), U.S. Economic Cooperation Projects in China Should

SEEK TO ENSURE THAT DECISIONS CONCERNING EMPLOYMENT IN THE UNITED STATES ECONOMIC COOPERATION PROJECT DO NOT ENTAIL DISCRIMINATION BASED ON SEX, RELIGION, ETHNIC OR NATIONAL BACKGROUND, POLITICAL BELIEF, NONVIOLENT POLITICAL ACTIVITY, OR POLITICAL PARTY MEMBERSHIP.

This provision seeks to assure that the employment practices of U.S.

⁴⁷ S. CHINA MORNING POST, Oct. 9, 1991 (article in authors’ possession).

companies in China respect the internationally-recognized right to non-discrimination. Perhaps no right is more fundamental than this one in international human rights law.⁴⁸

Further, this provision asks U.S. companies to implement principles that are also recognized under the law of the PRC itself and which have, in fact, often been emphasized in the Chinese government's own statements about its human rights policy. The PRC's "Human Rights White Paper," for example, devotes considerable attention to China's protection of women's rights, the achievement of equality for women in the workplace and society; freedom of religious belief and equal opportunity for members of all religious and ethnic and minority groups.⁴⁹ All of these rights have clear bases in the PRC Constitution⁵⁰ and specific legislation, including a new law on women's rights enacted by the National People's Congress in 1992.⁵¹ As the Chinese themselves admit, however, equal opportunity for women and ethnic minorities remains more a matter of principle than of reality in many sectors of the Chinese economy. Accordingly, the U.S. business efforts envisioned by this principle could help further important goals recognized by both Chinese and international law.

As far as "political belief" and "nonviolent political activity" are concerned, the Chinese Constitution enshrines "freedom of expression and association."⁵² As noted earlier, however, the use of both judicial and administrative methods to penalize the nonviolent expression of views remains prevalent in the PRC, and represents one of the leading violations of internationally protected human rights in the country.⁵³

Further, Chinese citizens detained because of nonviolent political activity are frequently penalized by discrimination in employment even after they are cleared of charges or exonerated from criminal penalties following conviction.⁵⁴ Pressure for employers not to hire or to discharge such people has extended to foreign joint venture companies. For

⁴⁸ See, e.g., U.N. CHARTER art. 55, 59 Stat. 1031, 1045-46 (signed June 26, 1945; entered into force Oct. 24, 1945), *Universal Declaration of Human Rights*, arts. 1-2, G.A. Res. 217, U.N. Doc. A/810, at 71 (1948); *International Covenant on Civil and Political Rights*, arts. 2(1), G.A. Res. 2200, 26, U.N. GAOR 21st Sess., Supp., No. 16, at 52, U.N. Doc. A/6316 (1966) 999 U.N.T.S. 171 (adopted Dec. 16, 1966 and reprinted in 6 I.L.M. 368 (1967) [hereinafter ICCPR]).

⁴⁹ Human Rights White Paper, *supra* note 11, at Chapters III, VI-VIII.

⁵⁰ XIANFA [Constitution] arts. 4, 36, 48 (P.R.C.).

⁵¹ The Law of the PRC Protecting Women's Rights and Interests, adopted April 3, 1992, English translation in FBIS-CHI-92-072-S, Apr. 14, 1992, at 17.

⁵² XIANFA [Constitution] art. 35 (P.R.C.).

⁵³ See generally LAWYERS COMMITTEE REPORT, *supra* note 6.

⁵⁴ See INT'L LEAGUE FOR HUMAN RIGHTS, *Human Rights in China: An Update (In Brief No. 43)* at 5 (Nov. 1991).

example, Zhou Liwu, who was sentenced to two years' imprisonment for his involvement in the 1989 democracy movement, found employment with a Taiwanese joint venture company in Guangzhou City after trying to find employment with various Chinese enterprises, which refused to hire him in light of his "problematic personal history." Although his supervisor was so pleased with Zhou's work that he soon put Zhou in charge of personnel matters, Zhou was suddenly fired at the end of his first month. Zhou's supervisor explained that he had come under so much pressure from the government for hiring Zhou that he had no choice but to fire him. According to Asia Watch, Zhou subsequently found other positions in joint venture companies, but was always fired within the first month because of renewed government pressure. Zhou finally "gave up and went back to his home village, where he now scrapes out a living as a peasant."⁵⁵

Finally, as regards "political party membership," PRC statements have emphasized the concept of "equality before the law" for all citizens and the elimination of "special privileges" for any sector of society, including Communist Party members.⁵⁶ Once again, however, and by the PRC's own admission, Communist Party members and other well-connected individuals continue to benefit from such privileges. Indeed, the Chinese government welcomes foreign business involvement in China in part as a source of expertise on managing a business operation in a manner that emphasizes economic efficiency rather than the fiat of powerful individuals. Thus, by implementing the first principle of the proposed code, U.S. companies would be acting in accord with ideals enshrined in China's own law and policy, as well as with U.S. and international human rights standards.

Like other provisions of the code, the manner in which this principle is framed—"seek to ensure that decisions concerning employment . . . do not entail"—avoids placing unrealistic demands on U.S. companies in China. U.S. investors may not always have complete control over employment decisions in their investment projects, depending upon such factors as the size and percentage of their investment in a project, the relative strength of their Chinese partner (which sometimes exerts strong pressure for the take-over of existing employees by a new joint venture) and the cooperation of local agencies.⁵⁷ At the same time, however, the

⁵⁵ ASIA WATCH, HUMAN RIGHTS WATCH, ANTHEMS OF DEFEAT: CRACKDOWN IN HUNAN PROVINCE 1989-92, at 61-62 (1992) [hereinafter ANTHEMS OF DEFEAT].

⁵⁶ See XIANFA [Constitution] art. 33 (P.R.C.).

⁵⁷ Geographic factors and differences in local labor regulations also may affect the degree to which U.S. companies can successfully promote fair employment standards. For example, in the southern special economic zones, foreign investment projects are typically granted considerable au-

annual evaluation of compliance with the code should interpret the "seek to ensure" language in a manner that assures good faith efforts by U.S. companies. In particular, a company that has a wholly-owned investment project in the PRC, with a large degree of control over the management and operations, should be held to a high standard of effort.

(2) *Pursuant to Section 941(b)(2), U.S. Economic Cooperation Projects in China Should*

ENSURE, THROUGH CONSULTATION WITH RELEVANT GOVERNMENT AUTHORITIES WHERE APPROPRIATE, THAT METHODS OF PRODUCTION USED IN THE UNITED STATES ECONOMIC COOPERATION PROJECT DO NOT POSE AN UNNECESSARY PHYSICAL DANGER TO WORKERS, TO NEIGHBORING POPULATIONS AND PROPERTY, AND TO THE SURROUNDING ENVIRONMENT.

Like the first principle, this provision dovetails with extensive PRC legislation and policy on labor safety and environmental protection.⁵⁸ Indeed, a stated goal of the PRC's effort to attract foreign investment is to improve labor safety and environmental protection techniques, as well as to learn the management skills essential to achieving these goals.

Despite such legislation, however, working conditions in China are a source of enormous concern in many areas, as the government itself acknowledges. A recent survey by the Provincial Health Administration in Guangdong Province found that more than 70 percent of joint venture firms in the province expose their workers to serious health risks.⁵⁹ The situation in Guangdong "mirrors a national trend of foreign-funded firms exploiting China's fledgling labour and health protection legislation to bring in potentially harmful production equipment and materials," according to *China Daily*.⁶⁰

The proposed provision is also consonant with international standards protecting human rights of workers. Those standards, examined in Part III, include assurances of occupational safety and a healthy working environment.

tonomy over local employment decisions, while companies in Beijing generally operate in a tighter regulatory environment. See generally HILARY K. JOSEPHS, *LABOR LAW IN CHINA: CHOICE AND RESPONSIBILITY* (1990); *FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 199-269 (Michael J. Moser ed., 1987).

⁵⁸ For a discussion of PRC labor laws and policies, see JOSEPHS, *supra* note 57.

⁵⁹ *Employers Ignoring Workers' Safety*, CHINA DAILY, Feb. 9, 1993, at 3.

⁶⁰ *Id.*

(3) Pursuant to Sections 941(b)(3) and (4), U.S. Economic Cooperation Projects in China Should

ENSURE THAT NO CONVICT OR FORCED LABOR UNDER PENAL SANCTIONS IS KNOWINGLY USED IN THE UNITED STATES ECONOMIC PROJECT, and ENSURE THAT NO GOODS THAT ARE MINED, PRODUCED, OR MANUFACTURED, IN WHOLE OR IN PART, BY CONVICT OR FORCED LABOR UNDER PENAL SANCTIONS ARE KNOWINGLY USED IN THE UNITED STATES ECONOMIC COOPERATION PROJECT.

Since in many cases the products of U.S. investment projects in China are exported in whole or part to the U.S. market, often through or with the assistance of the U.S. partner, compliance with the principle will promote compliance with the 1930 Smoot-Hawley Tariff Act discussed in Part I.B.2. As noted, enforcement of that law has been fraught with problems, despite the fact that violations of the law have received concerted international attention in the past two years.

While thus lending much-needed support to efforts to enforce compliance with the Smoot-Hawley law, these provisions of the code-of-conduct bill place no undue burden on U.S. companies. The word “knowingly” takes account of situations in which Chinese authorities have sought to disguise the use of “reform through labor” camps for economic purposes by giving two names to labor camp and prison factories, one indicating its nature as a correctional institution, the other resembling the name of a normal industrial facility. This approach reportedly has at times obscured the prison labor source of some of the production in U.S. companies’ joint venture operations in China.⁶¹ At the same time, however, the “knowingly” standard should be interpreted to assure that U.S. companies make concerted and bona fide efforts to police the source of products used in or produced by their economic projects in China. While the prohibition of prison labor would implement the Smoot-Hawley law, the provisions of the code-of-conduct bill regarding forced labor would also implement well-established principles of international labor law.⁶²

(4) Pursuant to Section 941(b)(5), U.S. Economic Cooperation Projects in China Should

UNDERTAKE TO PROTECT FREEDOM OF ASSEMBLY AND ASSOCIATION AMONG THE EMPLOYEES OF THE UNITED STATES ECONOMIC COOPERA-

⁶¹ The Joseph E. Seagram company reportedly was dismayed to discover in March 1991 that prison labor was used by the contractor it had hired to assemble boxes for its wine coolers produced in China. A number of other companies have had similar experiences. *China’s Ugly Export Secret: Prison Labor*, BUS. WEEK, Apr. 22, 1991, at 42.

⁶² See discussion *infra* part III.

TION PROJECT, AND TO FOSTER POSITIVE AND CONSTRUCTIVE CONSULTATION BETWEEN EMPLOYEES AND MANAGEMENT OF THE UNITED STATES ECONOMIC COOPERATION PROJECT.

The second part of this provision reflects the PRC's own stated goals for encouraging foreign investment. Those goals include not only the acquisition of foreign funds and technology, but also the development of skills and business practices involved in managing and running an efficient, modern enterprise. It is for this reason that the PRC's investment laws and policies have both allowed and encouraged foreign companies to station long-term management staff on the premises of economic cooperation projects. Free interaction between foreign and Chinese staff of a joint venture is obviously essential if these goals are to be met. In the post-Tiananmen period, the relatively open atmosphere that had emerged in the 1980s in Sino-foreign business projects sometimes became strained as Chinese employees were chided or even disciplined by Party authorities for having too much contact with their foreign counterparts, giving foreign managers too much information, going too far to accommodate the business needs of foreigners, and the like.⁶³ Fearing that extensive contact with members of the foreign business community might be a catalyst for what the Chinese call "peaceful evolution," hard-line members of the Chinese leadership have sought to restrict contacts between Chinese and foreigners.

Another key aspect of this provision, of course, involves freedom of association and assembly of Chinese staff of a venture. Like other provisions of the code of conduct bill, this principle is based upon well-established international law protecting both associational rights and the right to freedom of assembly.⁶⁴

Under this provision, a company would, *inter alia*, be expected to intervene if Chinese authorities interfered with a study group formed by its Chinese staff outside of working hours—whether to study computer science or foreign political theory. It should be reiterated, and perhaps emphasized in light of criticisms from the business community that the code of conduct might require U.S. companies to violate Chinese law, that the PRC Constitution protects citizens' "freedom of association and assembly."⁶⁵ At the same time, however, the Chinese government has systematically violated these rights. Chinese trade union law undercuts

⁶³ The Chinese deputy manager of a Sino-U.S. joint venture with which Mr. Gelatt is familiar, for instance, was subjected to extensive questioning and harassment by local Party officials for having been too helpful to the American partner in obtaining a tax concession from the local authorities. See discussion *infra* part III.

⁶⁴ See discussion *infra* part III.

⁶⁵ XIANFA [Constitution] art. 35 (P.R.C.).

the constitutional protections as they would generally be understood under international law by requiring unions to be formed under the auspices of national and local Party-run associations, and does not allow the formation of independent unions.⁶⁶ Further, although the constitutional protections as enunciated in China must, if they are to mean anything, encompass the type of study groups referred to above, this very type of activity has been subject to repeated interference by Chinese authorities, both in workplaces and in other fora. In some cases they have led to arrest and prosecution. Since mid-1992, the Chinese authorities have arrested a number of individuals in academia and other institutions for attempting to form human rights and pro-democracy study groups.⁶⁷

(5) Pursuant to Section 941(b)(6), U.S. Economic Cooperation Projects in China Should

PROMOTE THE TRAINING OF EMPLOYEES OF THE UNITED STATES ECONOMIC COOPERATION PROJECT, IN PARTICULAR THE TRAINING OF CHINESE EMPLOYEES IN MANAGERIAL POSITIONS IN THE PRINCIPLES OF MARKET-ORIENTED BUSINESS MANAGEMENT.

As indicated above, this provision reflects the PRC's own goals for the presence of foreign investors on its soil, as well as the goals of U.S. business in seeking to establish successful and profitable enterprises in the PRC. As an initiative urging U.S. companies to promote managerial training for non-U.S. employees abroad, this provision also has precedent in the Sullivan Principles for the conduct of U.S. businesses in South Africa. The Sullivan code, which was incorporated into congressional legislation in 1986,⁶⁸ similarly committed U.S. companies to undertake affirmative measures for the managerial training of black and non-white South African employees.

Promotion of managerial training as an element of human rights strategy rests upon a two-fold rationale about the leverage of U.S. business abroad: 1) economic forces have a unique capacity to erode the social basis of human rights violations and 2) with its relative autonomy, a U.S.-owned or -managed workplace provides an arena in which a company's efforts can be most effective. While the first premise has been the subject of substantial debate, it has been a central contention of the U.S. business community in arguing against divestment in South Africa and in opposing revocation of MFN status for China. Accordingly, while reflecting the economic objectives of both the PRC and U.S. business in

⁶⁶ Trade Union Law of the PRC, adopted Apr. 3, 1992, art. 34, translation in FBIS-CHI-92-072-S, Apr. 14, 1992, at 8 [hereinafter Trade Union Law]; JOSEPHS, *supra* note 57, at 99.

⁶⁷ MAR. 1993 ASIA WATCH REPORT, *supra* note 5.

⁶⁸ See *supra* note 45.

China, this provision recognizes and implements U.S. investors' favored strategy for human rights intervention.

The second premise is largely supported by the accomplishments of the Sullivan Principles in South Africa. While the broader impact of the Sullivan code in ending apartheid is disputed, the code has had significant, if limited, effects in the companies that have adhered to it. By the end of 1984 advocates of the Principles pointed to the following changes within the workplaces of adherents: the end of discrimination on the company property of all signatories; equal pay for equal work by all signatories; and common medical, pension and insurance plans available to all workers, regardless of race.⁶⁹ Further, by 1986 Sullivan signatories had spent more than \$250 million in social programs, including training and educational projects.⁷⁰ Since then, signatories have continued to achieve increases in the percentage of managerial and supervisory positions filled by non-white South Africans.⁷¹

(6) *Pursuant to Section 941(b)(7), U.S. Economic Cooperation Projects in China Should*

UNDERTAKE TO PROTECT FREEDOM OF EXPRESSION FOR THE EMPLOYEES OF THE UNITED STATES ECONOMIC COOPERATION PROJECT, INCLUDING THE FREEDOM TO SEEK, RECEIVE, AND IMPART INFORMATION AND IDEAS OF ALL KINDS.

As with other provisions of the proposed code of conduct, implementation of this principle would not require U.S. businesses to apply standards that are antithetical to China's own law and stated policy. In the "White Paper" on human rights and in numerous other pronouncements on this issue over the years, PRC authorities have stated that Chinese citizens enjoy the constitutionally-protected right to hold and express their views,⁷² and have insisted that mere expression does not give rise to criminal prosecution. As indicated, however, the reality has

⁶⁹ Roy A. Schotland, *Divergent Investing of Pension Funds and University Endowments: Key Points About the Pragmatics, and Two Current Case Studies*, in *DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE?: AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* 31, 63 (John H. Langbein et al., 1985).

⁷⁰ RICHARD W. HULL, *AMERICAN ENTERPRISE IN SOUTH AFRICA* 336 (1990).

⁷¹ An assessment of compliance with the Principles prepared by Arthur D. Little notes that the percentage of whites supervised by non-white South Africans increased from 3.5% in 1985 to 10.5% in 1991. The data on hiring practices also reflect significant changes: the percentage of managerial level vacancies filled by non-white South Africans increased from 14% in 1985 to 27% in 1991; non-whites filling vacated supervisory positions rose from 41% to 60% for the same period. ARTHUR D. LITTLE, INC., *FIFTEENTH REPORT ON THE SIGNATORY COMPANIES TO THE STATEMENT OF PRINCIPLES FOR SOUTH AFRICA* 13, 15.

⁷² XIANFA [Constitution] art. 35 (P.R.C.); Human Rights White Paper, *supra* note 11, at Chapter IV.

been quite different. In addition to the prominent cases of dissident figures imprisoned in connection with the Tiananmen events, there is a continuing pattern of prosecutions and administrative detentions for peaceful expression of political views. For example, on June 4, 1991 a technician from a foreign joint venture company in Guangzhou wrote out a banner commemorating the anniversary of the Tiananmen incident, which said: "The martyrs to democracy are not forgotten—the democratic movement will live forever." The man was immediately arrested when he placed the banner in front of a statue of Sun Yatsen.⁷³

Here, as with most provisions, the proposed code asks U.S. companies to promote internationally recognized human rights that have a significant nexus with their own business operations and interests. The Chinese concept of "state secrets" has often been abused to punish citizens for revealing publicly available information to foreigners.⁷⁴ In the aftermath of the June 1989 crackdown, there were repeated reports of Chinese employees of joint ventures being harassed or disciplined by authorities for doing exactly what their jobs required of them—providing necessary economic, legal and business information to their foreign counterparts to enable the proper functioning of the venture. The Chinese law on state secrets has been revised to establish much clearer definitions of what constitute "state secrets" than previously existed, and to require that documents legally required to be classified be appropriately marked with the relevant degree of secrecy.⁷⁵ This law provides a basis in Chinese law for foreign businesspersons to resist interference with legitimate open communication.

(7) Pursuant to Section 941(b)(8), U.S. Economic Cooperation Projects in China Should

DISCOURAGE COMPULSORY POLITICAL INDOCTRINATION ON THE PREMISES OF THE OPERATIONS OF THE UNITED STATES ECONOMIC COOPERATION PROJECT.

⁷³ See ANTHEMS OF DEFEAT, *supra* note 55, at 71.

⁷⁴ One of two charges against a Chinese staff member of Shell International Petroleum, leading to six and a half years in solitary confinement during the cultural revolution, was that she wrote a foreigner about the size of Shanghai's grain supply for a given year. She was also accused of defending a "traitor" and opposing a Central Committee resolution. NIEN CHENG, *LIFE AND DEATH IN SHANGHAI* 353 (1986). Recently, a young Chinese man, Bai Weiji, and his wife, Zhao Lei, were sentenced to 10 and six years in prison respectively for providing reports about the economy, analyses of recent foreign policy issues and speeches by Chinese leaders to a reporter for *The Washington Post*. Lena H. Sun, *Casualties of A Paper War In China: Every Day, Citizens Are Arrested; This Time, They Were My Friends*, WASH. POST, July 25, 1993, at C1; Nicholas D. Kristof, *Chinese Gets 10 Years for Giving Data to Foreigner*, N.Y. TIMES, July 30, 1993, at A6.

⁷⁵ See Timothy A. Gelatt, *The New Chinese State Secrets Law*, 22 CORNELL INT'L L.J. 255 (1989).

This provision seeks to assure that U.S. businesses operating in China do not themselves become complicit in practices that infringe on the internationally-recognized right to freedom of thought and political opinion.⁷⁶ Despite the strong nexus between the conduct addressed and the companies affected by this principle, the U.S. business community has voiced particular objection to this provision, arguing that it would require violation of Chinese law.

This objection is unfounded. The relevant law is a 1987 set of "Provisional Regulations on the Provision of Political Ideological Activities for Chinese Employees of Sino-Foreign Joint Equity and Sino-Foreign Cooperative Enterprises," promulgated jointly by the State Economic Commission, the Propaganda Department of the Central Committee, the Organization Department of the Central Committee, the All-China Federation of Trade Unions and the Communist Youth League.⁷⁷ Although these regulations clearly contemplate education in basic Party principles and state ideology for employees of Sino-foreign joint business ventures, they in no way *require* such education. Most significant in this regard, the regulations in Article 5 provide that joint ventures shall "adopt flexible and varied methods and forms of ideological education for its Chinese employees . . . Mass educational activities shall be conducted after work hours. If it is necessary for these activities to occupy work time, the approval of the administrative leaders of the enterprise shall first be obtained."⁷⁸ Specific regulations on Chinese trade unions, which are generally responsible for political education activity in both Chinese and foreign-invested enterprises, similarly provide that trade union activity shall in general be conducted outside of working time unless otherwise approved by enterprise management.⁷⁹ Although the Chinese legislation cited refers to the time, rather than the place, of political study activity, it is the premise of Chinese legal provisions on trade unions in joint ventures (which, as noted, are the primary vehicles for political education) that such unions will have their own premises in which to conduct their activities.⁸⁰ While these Chinese provisions may not be directed at human rights concerns, they do take account of foreign businesses' objection to the idea of political study infringing on the proper functioning of

⁷⁶ See, e.g., ICCPR, arts. 18 and 19, *supra* note 48, at 55; *Universal Declaration of Human Rights*, arts. 18 and 19, *supra* note 48, at 74.

⁷⁷ Promulgated Aug. 11, 1987 reprinted in *BUSINESS LAWS OF THE PRC* (CCH), at 15, 631.

⁷⁸ *Id.* at 15, 635.

⁷⁹ Trade Union Law, *supra* note 66, at 8.

⁸⁰ Regulations for the Implementation of the Law of the People's Republic of China on Chinese-Foreign Joint Ventures, issued by the State Council, Sept. 20, 1983, art. 99; Trade Union Law, *supra* note 66, art. 38.

an enterprise. U.S. businesses should capitalize on this pragmatic concern, as reflected in relevant Chinese legislation, to achieve enhanced human rights protection for their Chinese staff as well as greater productivity.

Since, as noted, Chinese regulations provide for the possibility of political study during working time upon the approval of management, U.S. companies whose American management staff play a leading role and who enjoy a majority interest in a Sino-American joint venture, as well as companies with wholly-owned ventures, should be held to particularly high standards in implementing Principle 8.

(8) The Final Principle Seeks to Assure that U.S. Economic Cooperation Projects

ATTEMPT TO RAISE WITH THE RELEVANT AGENCIES OF THE CHINESE GOVERNMENT THOSE INDIVIDUALS DETAINED, ARRESTED, OR CONVICTED SINCE MARCH 1989 SOLELY FOR NONVIOLENT EXPRESSION OF THEIR POLITICAL VIEWS, AND TO URGE THE OFFICIALS CONCERNED TO RELEASE PUBLICLY A LIST OF THE NAMES OF THOSE INDIVIDUALS.

This provision is a particularly constructive attempt to harness the influence of the U.S. presence in China to promote human rights there. We believe that companies should, whenever possible, attempt to implement this principle by working for the release of political prisoners in areas of China where they have significant operations.

Like the Sullivan Principles, which required adhering corporations to support the elimination of South African apartheid laws, this principle urges corporations operating in China to play a proactive role in addressing one of the most serious blights on China's human rights record. Hundreds, if not thousands, of individuals are currently detained in China because of their peaceful expression of views. As with other provisions of the code, this principle does not require companies to apply standards that are outside the bounds of Chinese law or stated policy, which asserts that citizens enjoy the freedom to express views peacefully.⁸¹

II. RESPONSIBILITIES OF THE BUSINESS COMMUNITY

As the discussion in Part I makes clear, the most important U.S. efforts to promote human rights in China have substantial implications for U.S. companies that export and invest there. In consequence, the business community simultaneously has emerged as a central voice in the

⁸¹ For further discussion of business efforts in this regard, see part II, *infra*. For analysis of the procedural provisions of the code-of-conduct legislation, see GETTING DOWN TO BUSINESS, *supra* note 1.

domestic debate about U.S. human rights policy toward China, and has become the focus of debate about its own human rights responsibilities in the PRC. Though triggered by the unique confluence of U.S. policy interests in the PRC, the latter debate has implications reaching far beyond China, and indeed has inspired a broader reexamination of the human rights responsibilities of corporations that operate across borders.⁸²

Notably, some of the most developed thinking in this regard has taken place in the boardrooms of corporations. As elaborated below, a growing number of transnational companies have in recent years adopted human rights policies governing their overseas investment practices, and the trend has been toward adoption of increasingly stringent policies. Spurred in part by public criticism of corporations whose overseas investments appear to support repressive practices, these policies have, with some exceptions, emerged without substantial guidance from either the professional human rights community or the U.S. government about appropriate standards for corporate investment in highly repressive countries. And so, as one corporation after another seeks to meet its human rights responsibilities, there is a pressing need for clarity about what, precisely, those responsibilities are.

In addressing this issue, we begin by examining the sometimes conflicting values that have shaped recent debate about corporations' human rights responsibilities. Building on that analysis, we consider broader issues raised by efforts to promote human rights by regulating U.S. corporations' conduct overseas. Specifically, we address the question whether it is appropriate for a national government to promote values embedded in public international law by regulating private actors' conduct in another country.

A. Do Businesses Have Human Rights Responsibilities?

In considering the policy concerns that drive current debate about corporations' human rights responsibilities, it is useful first to make clear what is *not* at issue. Business leaders now rarely press the claim, once commonplace, that social policy and corporate practice occupy distinct spheres—and that a rigid separation should be preserved.⁸³ Perhaps

⁸² See Frank Gibney Jr., *Questions About China: U.S. Companies Are Caught in a Debate Over Beijing's Human-Rights Record*, NEWSWEEK (int'l ed.), May 17, 1993, at 40.

⁸³ For a classic statement of the view that businesses should not be concerned with "social responsibility," see Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 11, 1970 (Magazine), at 32. This claim has long been discredited, at least in its most sweeping form, in part because it is hopelessly circular. Our beliefs about what are proper concerns of the business community are themselves social constructs, and have evolved significantly over time in tandem with broader changes in the social and political environment. Further, to the

more to the point, at a time when consumers are increasingly assertive in demanding that the products they purchase be produced in a manner they deem "socially responsible," it is scarcely possible to draw a bright line between corporations' goal of maximizing profits and social expectations that they behave responsibly. Increasingly, public attention to such issues as the use of prison labor in products exported to the United States is making human rights a "bottom line" concern for multinational companies.⁸⁴

Further, no company can afford to disregard the impact of massive human rights violations on the investment climate in a country where it may operate. The rule of law—the bedrock of human rights protection—is also essential to a stable and predictable environment for investment. One need only consider the devastating effect on the economies of the Latin American countries ruled by military dictatorships throughout the 1970s and, in many cases, into the 1980s to appreciate the correlation between massive human rights violations and investment risk.⁸⁵

In part for these reasons, it is increasingly rare to hear business representatives claim that human rights issues are of no legitimate concern to corporations.⁸⁶ Still, the generalization that transnational investors may profit from a host country's respect for human rights—as well as their own adherence to human rights principles—is of scant value in addressing the question whether corporations have responsibilities in respect of human rights. In particular, the truism that corporate interests

extent that this argument asserts that it is the role of government to fashion and implement policy—in this case human rights policy—it also necessarily concedes to government the right to further specific policies by, *inter alia*, regulating the practices of U.S. corporations. Examples of such regulation, from legislation restricting companies' ability to discriminate or pollute at home, to laws prohibiting corrupt practices by corporations abroad, are too numerous to leave any room for doubting the legitimacy of government efforts to advance social policies in part by regulating corporate behavior.

⁸⁴ See McCormick & Levinson, *supra* note 4, at 48.

⁸⁵ There are, to be sure, some apparent counter-examples of countries with strong economies despite serious violations of human rights—in Latin America, Chile under Pinochet stands out as a notable example. But those who might suggest that these economies are strong *because* the government denied citizens' fundamental rights pose a false dichotomy. One can hardly imagine that Augusto Pinochet's economic policies, to the extent they were successful, would have been less so had his government not "disappeared" and killed over 2,000 people. (Indeed, if it were necessary to prove that one needn't choose between economic growth and respect for human rights, Chile's economy has thrived under the democratic government of Patricio Aylwin, which succeeded the 17-year dictatorship of General Pinochet.)

⁸⁶ But see Matthew Lippman, *Transnational Corporations and Repressive Regimes: The Ethical Dilemma*, 15 CAL. W. INT'L L.J. 542, 549-50 (1985) (noting that executives of multinational companies "typically respond to criticism of their relationship with repressive regimes by pointing out that corporations are economic rather than political entities and that as such they should not be held responsible for the policies pursued by their host countries. . . .").

are in some respects well served by adherence to human rights standards provides no guidance in identifying corporations' responsibilities in situations where there is an apparent or genuine conflict between their business interests and human rights values.

Is there, for example, any principled reason to fault corporations for taking advantage of cheap labor in a developing country? Does the answer to this question depend on whether labor conditions fall below a minimum standard of acceptability? Do transnational investors in a nation like China bear some measure of responsibility for the country's human rights problems on the ground that their investments help sustain a highly repressive government? On the other hand, in today's economy, can U.S. companies afford *not* to invest in the world's largest and fastest-growing market? Does their investment indeed serve human rights goals—as many companies claim—as well as their economic interests?

These questions begin to frame the issues that are the pith of current debate about the appropriate role of businesses in responding to human rights violations in countries where they have substantial investments. No country has done more to sharpen that debate than China. It is the proverbial test case: how we define foreign investors' human rights responsibilities in China will serve as a critical precedent elsewhere. The current parameters of debate over corporations' human rights role in China are thus well worth examining.

As indicated in part I.B.4, that debate has revolved, above all, around the annual determination of China's MFN trade status. Though views within the business community have varied, the overwhelming majority of U.S. companies with substantial business activity in China have opposed efforts to attach human rights conditions to renewal of China's MFN status. While their principal concern has been the impact of such conditions on their exports and investments,⁸⁷ corporate spokespersons have repeatedly invoked the rhetoric of human rights in support of their position. In particular, business representatives have opposed proposals to attach human rights conditions to renewal of China's MFN status on the ground that the very presence of U.S. companies in China has a liberalizing effect and that this presence should not be imperiled.

This assertion encompasses several distinct claims. In the context of China, business leaders have frequently asserted that the web of contacts between Chinese citizens and U.S. investors that develops in the course of business relationships promotes the transfer of liberal democratic values from this side of the Pacific to the East.⁸⁸ Further, advocates of

⁸⁷ See *supra* part I.B.4.c.

⁸⁸ See, e.g., UNITED STATES-CHINA BUSINESS COUNCIL, CHINA POLICY: FOSTERING US COM-

“constructive engagement” also claim that transnational investment in repressive nations promotes greater integration of the host country in the international community, thereby enlarging its exposure to the shared values of civilized nations.⁸⁹ It is sometimes further asserted that liberal political values are an inevitable concomitant of a liberal market economy, and that transnational efforts to foster development of such an economy in China through expanded trade and investment practices will therefore promote political liberalization as well.⁹⁰

A third and related claim is that U.S. investment in developing countries promotes economic growth, thereby fostering development of a middle class. Since, the argument continues, it is when this happens that citizens begin to assert demands for fundamental liberties, business investment spurs longer-term progress in respect of human rights. In the shorter term, foreign investment creates opportunities for employment that enhance the economic and social rights of the direct beneficiaries.⁹¹

These are compelling arguments, and cannot be readily dismissed. But are the claims justified?

It depends. Whether a substantial U.S. business presence contributes to improved human rights conditions or helps bolster a repressive regime depends on the particular circumstances of each country, the conditions under which businesses operate, and the behavior of the businesses themselves. When, for example, the manager of a joint venture operation discharges a Chinese employee because of government pressure based on the individual’s support for democracy, that manager becomes an agent for the Chinese government’s denial of internationally-recognized human rights. When, instead, a potential investor insists as a precondition of investing on assurances that its employees’ right to freedom of association will be fully protected, that investor’s presence may in fact help foster improved human rights conditions. But here, too, an inves-

PETITIVENESS AND THE BILATERAL RELATIONSHIP; Testimony on U.S.-China Trade Relations, Statement of the Emergency Committee for American Trade on United States-China Trade Relations to Subcommittee on Trade of the Ways and Means Committee of the House of Representatives, June 8, 1993; Richard W. Younts, Senior Vice President and Corporate Executive Director International-Asia and Americas, Motorola, Before the Subcommittee on Trade, Ways and Means Committee of the House of Representatives, June 8, 1993 [hereinafter *Motorola Testimony*]; see also, generally, Barber B. Conable, Jr. & David M. Lampton, *China, The Coming Power*, FOREIGN AFF., Winter 1992/93, at 145, 146; .

⁸⁹ See Lippman, *supra* note 86, at 550.

⁹⁰ *Motorola Testimony*, *supra* note 88; THE ATLANTIC COUNCIL OF THE UNITED STATES & NATIONAL COMMITTEE ON UNITED STATES-CHINA RELATIONS, UNITED STATES AND CHINA RELATIONS AT A CROSSROADS, 20-28 (1993); see also, generally, Conable & Lampton, *supra* note 88, at 146.

⁹¹ See Lippman, *supra* note 86, at 550.

tor's ability to promote human rights may vary widely depending on both the conditions in a host country and on the nature of its investment. A company with direct investments in a country may, for example, have greater scope to promote human rights than a corporation that merely utilizes contractors there.

The larger claim that investment in a country like China helps foster human rights improvements as a byproduct of its increased contact with individuals who subscribe to liberal values seems incapable of standing on its own as a justification for investment, if only because there can be no dispositive way of testing this claim. While some argue, for example, that areas of China with large levels of foreign investment, such as the southern provinces of Guangdong and Fujian, boast relatively good human rights records, there is significant evidence to the contrary. Recent reports indicate that in Guangdong, where both domestic economic reform and foreign business and investment activity outpace such reforms and activities in every other part of China, arbitrary arrests and violations of minimal due process rights have contributed to a prison population larger than that of any other province in China.⁹²

The claim that enhanced employment opportunities made possible by foreign investment in and of themselves advance human rights is initially appealing, but proves problematic upon closer scrutiny. To the extent that the transnationalization of investment has engendered a global chase for the cheapest labor markets, international investment practices inevitably drive down wage levels as developing countries compete for foreign investment.⁹³ In this setting, it has become increasingly difficult to persuade governments of developing countries to respect internationally-recognized labor rights, particularly the right to receive a wage that meets the "basic human needs" of workers.⁹⁴

In the longer term, this phenomenon has in many developing countries apparently retarded further expansion of the middle class, and instead has widened the economic gap between laborers and the management class.⁹⁵ Against this background, it is increasingly difficult to assume that investment in and of itself will promote expansion of a

⁹² Carl Goldstein, *Two Faces of Reform: Guangdong's Economy Booms, But the Crime Rate Soars*, FAR E. ECON. REV., Apr. 8, 1993, at 15.

⁹³ This point was developed by John J. Keller, a business executive, at a workshop on business investment and human rights in Asia convened by the Washington College of Law of The American University and Asia Watch in Washington, D.C. on February 26, 1993. Cf. Note, *Forum Non Conveniens and Multinational Corporations: A Government Interest Approach*, 11 N.C.J. INT'L L. & COM. REG. 699, 712-13 (1986) (discussing "industrial flight" phenomenon associated with heavily regulated industries).

⁹⁴ See discussion *infra* part III.A.

⁹⁵ Again, the authors owe this point to John J. Keller. See note 93, *supra*. Our analysis assumes

middle class, thereby enlarging the number of citizens who enjoy economic and social rights and simultaneously making it more likely that citizens will insist upon personal and political freedoms. In this respect too, then, whether foreign investment promotes human rights depends—in this instance, on whether the foreign investor assures adequate conditions of work, including fair wages.

While the impact of foreign investment on human rights thus cannot be captured by superficial generalizations, it is equally clear that transnational business practice can, and often does, have a direct and substantial impact on human rights conditions in a host country. The previously-noted example of an investor in China who is pressured to discharge an employee because of her political beliefs exemplifies the point, and other examples are seemingly infinite. It is precisely because (and when) investment practices have significant human rights consequences that it is appropriate to hold corporations responsible for those consequences. To the extent that their investment practices directly affect human rights conditions, transnational corporations have a corresponding responsibility to assure, at a minimum, that their operations do not contribute, however inadvertently, to violations. As we elaborate elsewhere, the determination whether a company's investment practices contribute to human rights should, in highly repressive countries, include an analysis of whether the investment in and of itself makes a company complicit in pervasive violations. In Myanmar (Burma), for example, it is virtually impossible for foreign investors to enter a joint venture arrangement without having as a direct or indirect business partner the notoriously repressive military junta, the State Law and Order Restoration Council, and this should weigh heavily in prospective investors' decisions. More generally, substantial foreign investment may help stabilize a repressive regime that would otherwise be more responsive to human rights pressure.

As stated at the outset, we also believe that U.S. and other major investors in China should affirmatively promote human rights improvements there because they possess unique influence with the Chinese government. When U.S. corporations or individual business executives have undertaken affirmative measures along these lines, their impact has been substantial. Their accomplishments, examined below, make clear that private investors could have a singular impact on the state of human rights in China if they undertook to make human rights considerations a key component of their business strategies. The fact that the Chinese

that the local employment opportunities created by foreign investment in underdeveloped countries tend to consist overwhelmingly of non-value-added jobs.

government publicly hails soaring levels of foreign investment for propaganda effect makes it all the more vital that foreign investors make clear where they stand on human rights.

B. Regulating Private Actors to Enforce Public International Law

Implicit in the foregoing analysis are several important assumptions: 1) There is now a set of "human rights" that can be readily identified and objectively defined; 2) It is appropriate to expect transnational corporations to curb otherwise permissible investment practices when they imperil basic rights; and 3) In the absence of adequate self-regulation by corporations, national governments may appropriately regulate corporate behavior to further human rights goals, even with respect to overseas conduct. All three of these assumptions are implicitly challenged by the charge, which has at times been put forth by representatives of the business community (as well as others), that efforts to link investment practices to human rights conditions is a form of cultural imperialism—a misguided effort to impose American values on other nations.

The answer to this claim is simple. Human rights are not exclusively American values; they are universal. International law imposes obligations on all states to respect certain universal rights.⁹⁶ As elaborated in Part III, those rights include a core set of rights relating to labor conditions, as well as more generally-applicable assurances of personal autonomy. These rights are defined in positive international law, and have long been the subject of international enforcement efforts.⁹⁷

Although relevant international instruments typically establish duties on the part of *states* to respect individuals' rights, they also have significant implications for the behavior of non-governmental actors, including corporations. The key international human rights conventions typically require States Parties not only to respect the rights enumerated in the treaties, but also to "ensure" or "secure" those rights.⁹⁸ That duty

⁹⁶ See generally LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 980-1001 (2d ed. 1987) [hereinafter INTERNATIONAL LAW]. The universality of human rights was recently reaffirmed at the U.N.-sponsored World Conference on Human Rights, held in Vienna, Austria in June 1993. See Final Document of the World Conference on Human Rights, para. 3 (1993).

⁹⁷ Internationally-recognized human rights standards have been incorporated into a broad array of federal laws governing U.S. foreign policy. See Diane F. Orentlicher, *The Power of an Idea: The Impact of United States Human Rights Policy*, 1 TRANSNAT'L L. & CONTEMP. PROBS. 43, 48-49 (1991). Some state and city governments in the United States also have adopted policies designed to promote human rights in particular foreign countries. See Michael H. Shuman, *Two Wrongs Don't Make Human Rights*, BULL. MUNICIPAL FOREIGN POL'Y (Winter 1989-90), at 4.

⁹⁸ See, e.g., ICCPR, art. 2(1), *supra* note 48, at 53; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, art. 1, 213 U.N.T.S. 221 (signed on Nov. 4, 1950; entered into force Sept. 3, 1953); *American Convention on Human Rights*, art. 1(1), adopted Jan. 7,

has authoritatively been interpreted to require States Parties to assert effective control over non-state actors to ensure that their conduct does not infringe individual rights recognized in the conventions.⁹⁹

Still, complex issues are raised by the question of *which* government should regulate transnational companies to assure that they do not infringe human rights. It seems fairly straightforward that a national government, such as the PRC government, can and should act to ensure that non-state as well as state actors operating within its sovereign borders do not infringe internationally-protected human rights. By placing primary responsibility for assuring protection of human rights on the government that has control of the relevant territory, international law seeks to assure adequate protection while respecting national sovereignty. The problem, of course, is that governments like that of the PRC are often themselves chief violators of human rights. Far from assuring that non-state actors within their borders respect human rights, the Chinese government brings pressure to bear on business and other enterprises to carry out government policies that infringe protected rights.¹⁰⁰ In this setting, leaving regulation of corporate activities that affect human rights to the host government would effectively preclude adequate protection of those rights.

Further, even a government that is more inclined than that of the PRC to protect the human rights of its citizens may be hard-pressed to enact adequate legal protections against potentially harmful conduct of foreign investors. Intense competition among developing countries for foreign investment, combined with multinational corporations' search for countries that offer them the lowest costs—typically correlated with a comparatively low level of regulation—operate as powerful disincentives for underdeveloped countries to impose stringent requirements on foreign investors.¹⁰¹ A compelling case can thus be made for holding national governments accountable for ensuring that the overseas conduct of

1970, O.A.S. Official Records, OEA/ser.K./XVI/1.1, doc. 65 rev. 1, corr. 1 (1970), *reprinted in* 9 I.L.M. 673 (1970).

⁹⁹ See generally Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2568-80 (1991). Further, the ICCPR, *supra* note 48, makes clear that non-state actors may not interfere with rights recognized under the Covenant. Article 5(1) provides:

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

¹⁰⁰ See *supra* text accompanying notes 54-55.

¹⁰¹ See Lippman, *supra* note 86, at 545; Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff* [hereinafter *One-Way Ticket*], 77 CORNELL L. REV. 650, 674-75 (1992).

their companies conforms with international human rights standards¹⁰² or for developing an appropriate international regulatory regime.¹⁰³

Policy considerations aside, it is clear that the United States has the power to regulate the overseas conduct of U.S. companies to assure their compliance with international human rights legal standards. Under the "nationality principle" of jurisdiction, the United States may regulate the overseas conduct of its nationals, including corporations.¹⁰⁴ Congress has in fact enacted numerous laws regulating the overseas conduct of U.S. corporations, governing such matters as their compliance with the Arab boycott of Israel and corrupt practices abroad.¹⁰⁵ There are, to be sure, limits on the extent to which the United States may regulate the overseas conduct of U.S. companies, particularly when a regulation would conflict with the law of the host state. In that situation, the host state's law generally should prevail.¹⁰⁶ (As noted elsewhere, none of the China-specific proposals advanced in this article would require U.S. companies to undertake action that conflicts with Chinese law.¹⁰⁷) Further, while both U.S. and international law generally forbid otherwise permissible assertions of extraterritorial jurisdiction if they would be "unreasonable,"¹⁰⁸ the reasonableness of such regulations is determined by, *inter alia*, "the importance of the regulation to the international political, legal, or economic system," according to the *Restatement (Third) of the Foreign Relations Law of the United States*.¹⁰⁹ U.S. regulation of American companies' overseas conduct that aims to assure compliance with international human rights law would fall squarely within this measure of reasonableness. Indeed, the peremptory status of a core set of internationally-recognized human rights¹¹⁰ would justify the United States in forbidding American companies from engaging in conduct abroad that

¹⁰² For discussion of a national government's self-interest in regulating its companies' overseas operations, see *One-Way Ticket*, *supra* note 101, at 675.

¹⁰³ One effort to establish international standards governing transnational corporations is the Draft U.N. Code of Conduct On Transnational Corporations. See Report on the Special Session of the Commission on Transnational Corporations, U.N. ESCOR Supp. (No. 7), U.N. Doc E/1983/Rev. 1 (Annex 11) at 12-27, *reprinted in* 23 I.L.M. 626 (1984).

¹⁰⁴ See *Steele et al. v. Bulova Watch Co.*, 344 U.S. 280, 285-86 (1952); *Skiriotes v. Florida*, 313 U.S. 69, 73 (1941); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 402(2) (1987) [hereinafter RESTATEMENT]. The U.S. government has somewhat greater scope to regulate the conduct of foreign branches of companies incorporated in the United States than that of subsidiaries of U.S. companies that are organized under the laws of a foreign state. See *id.* § 414.

¹⁰⁵ See INTERNATIONAL LAW, *supra* note 96, at 839.

¹⁰⁶ See RESTATEMENT, *supra* note 104, §§ 441, 414 cmt. d.

¹⁰⁷ See *supra* part I.B.5; see also discussion *infra* part III.E.

¹⁰⁸ See RESTATEMENT, *supra* note 104, § 403 cmt. a.

¹⁰⁹ See RESTATEMENT, *supra* note 104, § 403(2)(e).

¹¹⁰ See RESTATEMENT, *supra* note 104, § 702 cmt. n.

breaches those rights, even if its prohibition conflicted with a host country's law.¹¹¹

This form of extraterritorial regulation would be much in keeping with broader developments in transnational law. Municipal law that regulates transnational activities between non-state actors, as well as between such actors and state governments, occupies a growing area of transnational law.¹¹² While "formally regulat[ing] individual merchants outside national legal systems," that law "is ultimately dependent on them."¹¹³ An important subset of this law regulates private actors to promote public policy values, and in this sense stands at the intersection of private and public international law. The emergence of this form of regulation is an inevitable concomitant of, and appropriate response to, the growing influence of non-state actors in countries other than their national state.¹¹⁴ Such regulation may appropriately seek to shape state action in the host country by fostering "transnational patterns of interest"¹¹⁵ that are likely to have this effect.

To say that it is appropriate for a government, such as the U.S. government, to regulate the overseas conduct of companies that bear its nationality does not necessarily mean that such regulation is the most desirable means of assuring conformity with international human rights standards by transnational companies. As with other aspects of corporate practice that have a significant impact on social policy, government regulation is necessary only when companies fail adequately to police their own behavior. Further, as we suggest in Part I.B.4.b-c, the government can effectively play a proactive role in encouraging the private sector to police itself.

In the section that follows, we examine the accomplishments of several corporations and individual business executives who have provided leadership in defining and implementing transnational corporations' human rights responsibilities. Building on their efforts, we then set forth general recommendations for businesses investing or considering investing in China and other countries scourged by pervasive human rights violations.

¹¹¹ See RESTATEMENT, *supra* note 104, § 403 cmt. e.

¹¹² See Anne-Marie S. Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 230 (1993).

¹¹³ *Id.* at 232.

¹¹⁴ Cf. Susan Strange, *The Name of the Game*, in SEA-CHANGES: AMERICAN FOREIGN POLICY IN A WORLD TRANSFORMED 238 (Nicholas X. Rizopoulos ed., 1990) (discussing the erosion of national authority caused by the expansion of an "international business civilization").

¹¹⁵ Burley, *supra* note 112, at 232.

C. Business Initiatives to Promote Human Rights in China and Elsewhere

In the aftermath of the Tiananmen incident, a number of business executives and transnational corporations have sought to promote human rights in China. Perhaps the best-known individual initiative is the effort by U.S. businessman John Kamm to secure the release of persons detained for the non-violent expression of political opinion. Kamm, a long-time resident of Hong Kong, was general manager of Occidental Chemical Corporation Far East and was responsible for that company's considerable China operations when he began to address human rights violations in the PRC. At the time of the Tiananmen incident, Kamm was the chairman of the American Chamber of Commerce in Hong Kong, and in that capacity became an outspoken opponent of congressional efforts to attach human rights conditions to renewal of China's most favored nation (MFN) trade status. In testimony before Congress and in other fora, Kamm argued that the U.S. government should not adopt measures that could effectively sever China's trade relationship with the United States because, Kamm asserted, that relationship itself is an effective vehicle for liberalization. Believing that he had to gain human rights concessions from the PRC to avert congressional efforts to attach human rights conditions to renewal of China's MFN status, Kamm began to negotiate with Chinese authorities for the release of political prisoners in the course of his business visits to the PRC.

Kamm appears in fact to have been instrumental in securing the release of some political prisoners.¹¹⁶ Kamm, who left Occidental and now combines business consulting with human rights work in China, has stated that neither the business activities of Occidental nor his private consulting business have been adversely affected by his human rights interventions.¹¹⁷ In Kamm's view, he has been effective in his human rights efforts precisely because of his longstanding business relationship with the PRC.

At the level of corporate initiative, a growing roster of U.S.-based companies have adopted policies designed to address human rights con-

¹¹⁶ For example, *The New York Times* reported that the Chinese government announced on May 22, 1992 that it had released three elderly Roman Catholic clerics from detention, and noted that John Kamm had been lobbying for their release. Sheryl WuDunn, *China Releases 3 Catholic Priests Who Spent Decades in Detention*, N.Y. TIMES, May 23, 1992, at A3. See also Gibney, *supra* note 82, at 41 (estimating that Kamm's efforts "have contributed to the release of more than 100 students, priests and businessmen from Chinese jails.").

¹¹⁷ James McGregor, *Many U.S. Firms in China Keep Quiet About Success*, ASIAN WALL ST. J. WEEKLY, Nov. 11, 1991, at 16; Lena Sun, *The Business of Human Rights*, WASH. POST, Feb. 25, 1992, at D1.

cerns relating to investment in China and, in some instances, more globally. For example on March 31, 1992 Sears, Roebuck and Co. announced that it had adopted a formal policy to assure that its imports from the PRC do not include products made by prison labor. The policy requires that all contracts that Sears signs for the import of products emanating from China include a clause stating that none of the goods subject to the contract have been manufactured by "convict or forced labor."¹¹⁸

The policy also asserts that "Sears employees may from time to time conduct unannounced inspections of manufacturing sites in mainland China to determine compliance with U.S. law as regards the use of forced or convict labor." Further, the policy requires Sears to maintain lists of its Chinese suppliers' production sites and to attempt to compile a list of the addresses of sites of forced labor in the PRC, so that the two lists can be compared.

The Sears policy was adopted in the wake of an announcement by Levi Strauss & Co. that it would apply human rights and related criteria in its selection of business partners. Formally adopted in January 1992, that policy has had a significant impact on Levi Strauss & Co.'s investment decisions *vis-a-vis* China.

The policy, which addresses "Business Partner Terms of Engagement and Guidelines for Country Selection," includes several human rights guidelines as well as guidelines on such matters as the environment. The five-point "Guidelines for Country Selection" include a provision asserting that Levi Strauss & Co. "should not initiate or renew contractual relationships in countries where there are pervasive violations of basic human rights."¹¹⁹ Applying this provision, in late April 1993 Levi Strauss & Co. decided to begin a phased withdrawal from its operations in China, which involve sewing or finishing goods, a process that will continue to completion unless there is a substantial improvement in human rights conditions in the PRC. At the same time, the company decided that it would not initiate direct investment in China.¹²⁰

¹¹⁸ The reference to "convict or forced labor" is particularly important in light of revelations about the extent of forced labor practices in the PRC. According to Asia Watch, not only are prisoners serving court sentences required to work without compensation to produce goods from which the state profits, but so too are criminal suspects, including those in political cases, during lengthy periods of pre-trial detention. See ANTHEMS OF DEFEAT, *supra* note 55, at 104-11.

¹¹⁹ The human rights provisions of Levi Strauss & Co.'s "Business Partner Terms of Engagement" are set forth in Appendix A.

¹²⁰ Levi Strauss & Co. has terminated its relationship with at least 30 suppliers and extracted reforms from more than 120 others. See McCormick & Levinson, *supra* note 4, at 49. The company has also pulled out of Myanmar (Burma), closed down operations in Bangladesh and temporarily suspended operations in Peru pursuant to its policy. See Gibney, *supra* note 82, at 40.

Reebok International Ltd. adopted a human rights policy that responded to specific concerns raised by the human rights situation in China, and subsequently adopted a more comprehensive set of human rights principles governing workplace conditions in all of its overseas operations, including those in China.¹²¹ The first policy, adopted in November 1990, provided:

1. Reebok will not operate under martial law conditions or allow any military presence on its premises.
2. Reebok encourages free association and assembly among its employees.
3. Reebok will seek to ensure that opportunities for advancement are based on initiative, leadership and contributions to the business, not political beliefs. Further, no one is to be dismissed from working at its factories for political views or non-violent involvement.
4. Reebok will seek to prevent compulsory political indoctrination programs from taking place on its premises.
5. Reebok reaffirms that it deplores the use of force against human rights.

Like Reebok International Ltd. and Levi Strauss & Co., both Phillips-Van Heusen and the Timberland Company have developed ethical guidelines governing their relations with suppliers, contractors and business partners.¹²² Timberland's policy further bans the company from pursuing altogether business relations in a country "where basic human rights are pervasively violated." Although Timberland's human rights policy governs all of its overseas business relationships, the policy's development was driven by the company's desire to address issues raised by China in particular. In February 1993, Timberland decided to begin a gradual termination of its sourcing from China, a process it plans to complete by the end of 1993.

Variations among these three policies reflect each company's unique corporate values. All, however, do incorporate internationally-recognized human rights standards, and seek to assure that the companies' investment practices conform to those standards.

III. UNIVERSAL HUMAN RIGHTS PRINCIPLES FOR TRANSNATIONAL COMPANIES

As noted in Part II.B, international law provides objective standards for determining the human rights responsibilities of transnational corporations. We now turn to that law for guidance in identifying universally-

¹²¹ Those standards, adopted in December 1992, are set forth in Appendix B.

¹²² The human rights provisions of Phillips-Van Heusen's policy are set forth in Appendix C. Although Timberland has already begun to apply its policy, it has not, as of this writing, adopted its policy in final form. The company is expected to have done so by the time this article is published; copies of the policy will be available from the Office of Legal Counsel of the Timberland Company.

relevant human rights principles for transnational corporations. Our analysis in the next section focuses on an area of international law that is particularly pertinent to conditions over which transnational investors often have substantial control—workplace conditions in their overseas operations and in the facilities of their business partners. As we have noted elsewhere, however, the canvass of appropriate human rights concerns of transnational corporations is considerably broader than the workplace.

A. International Human Rights Law

International law has protected a core set of universally-recognized human rights since World War II. Those rights, and states' duty to respect them, are recognized in the Charter of the United Nations¹²³ and have been elaborated in numerous international instruments since 1948.

Although international law protecting human rights was "born in, and out of the Second World War," it had several pre-war antecedents,¹²⁴ including international law protecting various workers' rights. While that law dates back at least to early 19th Century protections against slavery, the foundation of most contemporary international standards protecting rights of workers is the 1919 Treaty of Versailles, which asserted that the signatories would "endeavor to secure and maintain fair and humane conditions of labor for men, women, and children, both in their own countries and in all countries to which their commercial and industrial nations extend. . ."¹²⁵ The treaty also established the International Labour Organisation (ILO), a tripartite organization comprising governments and representatives of employers and workers, which has established and monitored compliance with a broad array of labor standards. The ILO has promulgated some 170 international conventions elaborating labor standards, and members of the ILO are automatically bound to respect the core principles of freedom of association.¹²⁶

Basic workers' rights have also been incorporated in various international human rights instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights, which collectively are considered the international equivalent of

¹²³ See, e.g., U.N. CHARTER, *supra* note 48, at arts. 55-56.

¹²⁴ Louis Henkin, *Introduction to THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 5 (Louis Henkin ed. 1981).

¹²⁵ See BUREAU OF INT'L LABOR AFFAIRS, U.S. DEP'T OF LABOR, *WORKER RIGHTS IN U.S. POLICY* 2 (1991).

¹²⁶ See *id.*

the U.S. Bill of Rights. Over the course of the past decade, moreover, the United States has adopted a range of laws that incorporate these international standards into U.S. trade policy.

For example, in 1983 Congress passed the Caribbean Basin Economic Recovery Act,¹²⁷ which establishes a system for designating certain Caribbean countries that are eligible for duty-free benefits in their exports to the United States. The law directs the President, when determining a country's eligibility, to "take into account the degree to which workers in such country are afforded reasonable workplace conditions and enjoy the right to organize and bargain collectively."¹²⁸

In 1984 Congress enacted a law¹²⁹ that incorporated workers rights criteria in the General System of Preferences (GSP) program initiated in 1974.¹³⁰ That program authorizes the President to grant duty-free treatment to eligible imports from certain developing countries. The GSP law conditions duty-free treatment to otherwise eligible imports on whether the exporting country whether a country "has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized worker rights." Drawing on ILO-established standards, the GSP law defines "internationally recognized worker rights" to include:

- 1) the right of association;
- 2) the right to organize and bargain collectively;
- 3) a prohibition on the use of any form of forced or compulsory labor;
- 4) a minimum age for the employment of children; and
- 5) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

As this and other legislation tying U.S. trade privileges to worker rights suggest, international law establishes a core set of universally-protected labor rights, and those rights can be fully protected only through international cooperation in enforcement. And as our previous analysis suggests, a key component of an effective international strategy for protecting workers' rights is adherence by multinational corporations to minimum standards. In the following section we propose a set of princi-

¹²⁷ Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (codified at 19 U.S.C. §§ 2071-2706 (1988)).

¹²⁸ Subsequent legislation, the Caribbean Basin Economic Recovery Act, made workers rights criteria mandatory. 19 U.S.C. § 2702(c)(8) (1988).

¹²⁹ Title V of the Trade and Tariff Act of 1984, the Generalized System of Preferences Renewal Act of 1984, Pub. L. No. 98-573, § 501, 98 Stat. 2948, 3018 (codified as note to 19 U.S.C. § 2461 (1988)).

¹³⁰ Trade Act of 1974, Pub. L. No. 93-618, § 501, 88 Stat. 1978, 2066 (codified at 19 U.S.C. § 2461 (1988)).

ples that identify such minimum standards, drawing on relevant international law.

B. Universal Human Rights Principles for Transnational Corporations

Adherence to the following proposed principles would help assure that the employment practices of overseas production facilities owned or utilized by transnational companies comport with internationally-recognized human rights, particularly workers' rights:

Proposed Principles for Transnational Companies

Corporations with direct investments in other countries shall uphold the following principles in their overseas production facilities, and transnational companies also shall select business partners, including contractors, subcontractors and suppliers, who share their commitment to these principles:

1. **SAFE AND HEALTHY WORK ENVIRONMENT:** The production facilities owned or utilized by transnational companies shall assure employees a safe and healthy workplace. Employees shall not be exposed to hazardous conditions.

2. **NON-DISCRIMINATION:** The production facilities owned or utilized by transnational companies shall not discriminate in hiring and employment practices on such grounds as race, color, national origin, gender, sexual orientation, religion or other belief, or political or other opinion.

3. **FAIR WAGES:** The production facilities owned or utilized by transnational companies shall pay wages that support the basic needs of workers and their families. In no case shall they pay less than the minimum wage required by local law.

4. **WORKING HOURS AND OVERTIME:** In general, the production facilities owned or utilized by transnational companies should not require employees to work more than 48 hours per week, except for voluntary and appropriately compensated overtime, and should allow employees one day off each week. Employees shall not work in excess of the maximum hours permitted by local law.

5. **CHILD LABOR:** The production facilities owned or utilized by transnational companies shall not use child labor. "Child" generally refers to persons who are less than 14 years of age, or younger than the age for completing compulsory education if that age is higher than 14. In countries where the law defines "child" to include individuals who are older than 14, business investors should apply that definition.

6. **CONVICT OR FORCED LABOR:** The production facilities owned or utilized by transnational companies shall not permit the use of forced or compulsory labor, or labor by persons who are detained or imprisoned, in the manufacture of its products. Such companies should undertake affirmative measures, such as on-site inspection of production facilities, to assure that they do not manufacture or purchase materials that were produced by forced or prison labor, and should terminate business relationships with any sources found to utilize such labor.

7. **FREEDOM OF ASSOCIATION:** The production facilities owned or utilized by transnational companies shall respect the right of employees to establish and join organizations of their own choosing, without previous authorization. Such companies should attempt to assure that no employee is dismissed from a facility that produces their products or is otherwise penalized because of his or her non-violent exercise of the right of association.

8. **TRADE UNION RIGHTS:** The overseas production facilities owned or utilized by transnational companies shall respect the right of all employees to organize and bargain collectively.

9. **MILITARY PRESENCE ON PREMISES OF PRODUCTION FACILITIES:** Companies that own or utilize overseas production facilities should oppose any military effort to suppress internationally-protected labor activities of the facilities' employees.

Each of these proposed principles is based upon well-established international legal standards.

SAFE AND HEALTHY WORK ENVIRONMENT: The ILO has adopted a number of recommendations and standards on specific health and safety risks, some dating back to 1919. The broadest set of standards is set forth in Convention No. 155 (Occupational Safety and Health and the Working Environment, 1981), which aims at the establishment of a national policy on occupational safety, occupational health and the work environment that would prevent work-related accidents and injury to health by minimizing hazards in the working environment.¹³¹ The convention calls for an inspection system,¹³² provision by employers of protective clothing and equipment,¹³³ and protection for workers who remove themselves from work situations to avoid serious dangers to their lives or health.¹³⁴ The right to "[s]afe and healthy working conditions" is also recognized in the International Covenant on Economic, Social and Cultural Rights.¹³⁵

NON-DISCRIMINATION: The right to non-discrimination is a bed-rock principle of international human rights law. All of the guarantees set forth in the International Covenant on Economic, Social and Cultural Rights, including those that pertain to employment,¹³⁶ are subject to a general guarantee of non-discrimination.¹³⁷ In addition, a number of

¹³¹ 2 INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, Convention No. 155, *Occupational Safety and Health Convention, 1981*, art. 4, at 1230-31, ILO (1992).

¹³² *Id.* art. 9, at 1232.

¹³³ *Id.* art. 16(3), at 1234.

¹³⁴ *Id.* art. 13, at 1233.

¹³⁵ *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200, art. 7, U.N. GAOR, 21st Sess., Supp. No. 16, at 50, U.N. Doc. A/6316 (1966) (adopted Dec. 16, 1966 and entered into force Jan. 3, 1976) [hereinafter *ICESCR*].

¹³⁶ *Id.* arts. 7-8.

¹³⁷ *Id.* art. 2(2).

ILO instruments recognize the right to non-discrimination in employment matters. For example a 1949 Recommendation concerning Labour Clauses in Public Contracts provides: "It shall be an aim of policy to abolish all discrimination among workers on grounds of race, colour, sex, belief, tribal association or trade union affiliation in respect of" various specified aspects of employment.

FAIR WAGES: Of the various ILO conventions relating to wages, the most important one on minimum wages is the 1970 Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries.¹³⁸ Article 3 states that the elements that States Parties should take into consideration in determining the level of minimum wages shall, so far as possible and appropriate in relation to national practice and conditions, include

- (a) the needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and relative standards of other social groups; and
- (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.¹³⁹

The ILO's Recommendation No. 135, also adopted in 1970, provides in part that

- 3. In determining the level of minimum wages, account should be taken of the following criteria, amongst others:
 - (a) the needs of workers and their families;
 - (b) the general level of wages in the country;
 - (c) the cost of living and changes therein;
 - (d) social security benefits;
 - (e) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.¹⁴⁰

WORKING HOURS: The first ILO convention, adopted in 1919, established a general rule, subject to various specific exceptions, limiting the hours of work in industry to eight per day and no more than forty-

¹³⁸ ILO, Convention No. 131, *Minimum Wage Fixing Convention, 1970*, *supra* note 131, at 949.

¹³⁹ *Id.* art. 3, at 950; Article 23(3) of the Universal Declaration of Human Rights also recognizes a right to fair wages: "Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection." Universal Declaration of Human Rights, art. 23(3), *supra* note 48, at 75. Article 7 of the International Covenant on Economic, Social, and Cultural Rights also recognizes, as part of the right to the "enjoyment of just and favourable conditions of work," remuneration that provides workers, "at a minimum," with "[f]air wages" and "[a] decent living for themselves and their families." ICESCR, art. 7, *supra* note 135, at 50.

¹⁴⁰ ILO, Recommendation No. 135, *Minimum Wage Fixing Recommendation, 1970*, *supra* note 131, at 949.

eight per week.¹⁴¹ Convention No. 14, adopted in 1921, provides that workers employed in industry should have at least twenty-four consecutive hours of rest in every seven-day period.¹⁴² (Like other general rules established by ILO conventions, this one admits of some possible exceptions.) The right to reasonable working hours is also recognized in general human rights instruments. For example Article 24 of the Universal Declaration of Human Rights¹⁴³ provides: "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." Virtually every country's law recognizes a forty-eight hour work week (not including overtime).¹⁴⁴

CHILD LABOR: The ILO adopted several conventions designed to protect child workers in the 1930s and 40s, but its most comprehensive convention on youth employment, Convention No. 138, was adopted in 1973. That convention provides that the minimum age for employment "shall not be less than the age of completion of compulsory schooling and, in any case, shall not be less than 15 years."¹⁴⁵ But the convention goes on to say that an underdeveloped country may, after consulting with the ILO, initially set the minimum age at 14.¹⁴⁶ There are a few other variations, such as a minimum age of 18 for dangerous work (or 16 under specified conditions); an exception allowing apprenticeship training for children at least 14 years old; and an exception for light work for children between 13 and 15 (or at least 12 in countries where the minimum age is 14).¹⁴⁷

CONVICT OR FORCED LABOR: ILO Convention No. 29, which was adopted in 1930, aimed at the suppression of forced or compulsory labor "within the shortest possible period."¹⁴⁸ The convention defines "forced or compulsory labour" as "all work or service which is exacted from any

¹⁴¹ 1 INTERNATIONAL LABOUR CONVENTION AND RECOMMENDATIONS, Convention No. 1, *Hours of Work (Industry) Convention*, 1919, at 1.

¹⁴² ILO, Convention No. 14, *Weekly Rest (Industry) Convention*, 1921, art. 2(1), *supra* note 141, at 45.

¹⁴³ *Universal Declaration of Human Rights*, art. 24, *supra* note 48, at 75.

¹⁴⁴ Chinese law recognizes the concept of overtime, though it generally provides for more favorable remuneration for overtime work for workers in foreign investment enterprises than for those working in purely Chinese companies. China is party to at least 16 ILO conventions.

¹⁴⁵ ILO, Convention No. 138, *Minimum Age Convention*, 1973, art. 2(3), *supra* note 131, at 1031.

¹⁴⁶ ILO, Convention No. 138, *Minimum Age Convention*, 1973, art. 2(4), *supra* note 131, at 1031.

¹⁴⁷ China is a party to ILO Convention No. 59, which fixes the minimum age for children in industrial employment. That convention establishes a general minimum age of 15, subject to several exceptions (such as a higher age for dangerous work; exceptions for work done in technical schools and work in family businesses). ILO, Convention No. 59, *Minimum Age (Industry) Convention (Revised)*, 1937, *supra* note 141, at 240.

¹⁴⁸ 1 INTERNATIONAL LABOUR CONVENTION AND RECOMMENDATIONS, Convention No. 29, *Forced Labour Convention*, 1930, art. 1(1), at 115.

person under the menace of penalty and for which the said person has not offered himself voluntarily.”¹⁴⁹ The convention identifies circumstances that are not considered “forced or compulsory labour,” including “work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations.”¹⁵⁰ Further, the convention specifically provides that the competent state authority “shall not . . . permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations.”¹⁵¹ Any forced or compulsory labor for such individuals/companies/associations is to be suppressed completely and immediately.¹⁵² Although Convention No. 29 does not prohibit forced/compulsory labor by convicted prisoners working under the supervision of a public authority, a 1930 U.S. law, the Smoot-Hawley Tariff Act discussed in part I.B.2, prohibits the importation into the United States of goods produced in whole or part by “convict labor” as well as “forced labor or/and indentured labor under penal sanctions.”¹⁵³ ILO Convention No. 105, adopted in 1957, sets forth an outright prohibition of forced or compulsory labor in five specified circumstances.

FREEDOM OF ASSOCIATION AND THE RIGHT TO ORGANIZE AND BARGAIN COLLECTIVELY: These two principles are considered the bedrock of international workers’ rights,¹⁵⁴ and are protected by ILO Conventions No. 87 (1948) and No. 98 (1949) respectively. The proposed principle on the right of association tracks the pertinent language of ILO Convention No. 87. These two rights are also recognized in the Universal Declaration of Human Rights¹⁵⁵; the International Covenant on Civil and Political Rights¹⁵⁶; and the International Covenant on Economic, Social and Cultural Rights.¹⁵⁷ The final recommended principle, assert-

¹⁴⁹ *Id.* art. 2(1), at 115.

¹⁵⁰ *Id.* art. 2(2)(c), at 116.

¹⁵¹ *Id.* art. 4(1), at 116.

¹⁵² *Id.* art. 4(2), at 116.

¹⁵³ 19 U.S.C. § 1307 (1989).

¹⁵⁴ See WORKER RIGHTS IN U.S. POLICY, *supra* note 125, at 4 (“The most fundamental of all worker rights [are] the right to freedom of association . . . and the right to organize and bargain collectively . . .”).

¹⁵⁵ *Universal Declaration of Human Rights*, art. 20, *supra* note 48, at 75 (right of association); *id.* art. 23 (“right to form and to join trade unions for the protection of [one’s] interests”).

¹⁵⁶ *ICCPR*, art. 22(1), *supra* note 48, at 55 (right to “freedom of association with others, including the right to form and join trade unions for the protection of [one’s] interests”).

¹⁵⁷ *ICESCR*, art. 8, *supra* note 135, at 50 (right to form trade unions and join trade union of one’s choice; right of trade unions to function freely).

ing opposition to military efforts to suppress labor activities, is a specific assertion of these general principles.

Finally, the recommended provisions asserting support for workers' rights to freedom of association and the right to form and join trade unions would open the door to the possibility of companies intervening with their contacts in a host government on behalf of employees who were, e.g., detained and/or tortured because of their non-violent participation in a study group, whether or not the violation occurred on the premises of the companies' production facilities.

C. International Coordination

If the principles proposed in section B have a solid foundation in international law, they still have scant support in international practice—at least in the sense of universal compliance by multinational corporations with these standards. Indeed, as noted earlier the globalization of labor markets has, at least in some areas, served to drive down wage levels and to that extent has undermined international assurances of adequate pay. Thus, any meaningful effort to promote adherence to global principles along the lines suggested above would require coordination among companies from major investing nations.

The most appropriate forum for such coordination may be the Group of Seven Major Industrialized Democracies (G-7), whose members include Japan, Canada and the major industrialized democracies of Western Europe as well as the United States. The authors believe that the United States government should take the lead in urging other G-7 countries to agree to promote corporate adherence to international human rights standards along the lines outlined in section B—and, indeed, to utilize all appropriate multilateral fora to promote such coordinated efforts.¹⁵⁸

In particular, it is critically important to bring Japan along in any coordinated effort to apply human rights standards to investment in China. Japan, with the United States, is among the PRC's top few trading and investment partners, and U.S. companies are often in tight competition with their Japanese counterparts for the same contracts in the PRC. Japan's adherence to a set of human rights principles is thus clearly crucial. The United States should add this issue to the list of trade issues it is currently discussing with Tokyo. In this regard, it is relevant to note that in 1992 the Japanese government adopted new prin-

¹⁵⁸ As previously noted, the code-of-conduct legislation sponsored by Senator Kennedy and Representative Unsoeld, respectively, directs the U.S. Secretary of State to encourage OECD nations to promote similar principles for companies that invest in China.

ciples, which include a reference to human rights considerations, in its overseas development aid program.¹⁵⁹

D. To Invest or Not?

The proposals advanced in the preceding two sections seek to give substance to the general principle that corporations must assure that their own investment practices overseas do not contravene internationally-recognized human rights. To the extent that the principles proposed in section B assume that corporations have already undertaken overseas investments, they beg the hard question whether there are situations in which corporations should, on human rights grounds, avoid altogether investing in a country.

Adherence to the principles proposed in section B would diminish the significance of this issue by seeking to assure that foreign companies' presence in a repressive country does not contribute to human rights violations and potentially contributes to improvement. Still, there may be times when foreign investment in itself contributes to violations, if only by bolstering a highly repressive regime that might otherwise be more responsive to internal or external pressures to ameliorate violations. Moreover potential investors may in some cases be able to exert considerable positive influence on a government if they make it known that their investment determination will turn, in part, on human rights conditions. Accordingly if, as we have suggested, transnational companies' business decisions and practices should be guided by the principle that their conduct should not contribute to human rights violations and their influence should be harnessed on behalf of human rights, it surely is appropriate for companies to consider whether contemplated business decisions will have an impact on human rights conditions.

The approach taken by Levi Strauss & Co. serves as a useful model in this regard. As noted in part II.B., Levi Strauss & Co. has adopted a policy pursuant to which it will not "initiate or renew contractual relationships in countries where there are pervasive violations of basic human rights," and has determined that this standard is a bar to investment in both China and Myanmar (Burma).¹⁶⁰ At the same time, Levi Strauss & Co.'s "Business Partner Terms of Engagement" help assure that its operations in countries that have human rights problems—albeit

¹⁵⁹ Jendrzejczyk, *supra* note 24. For discussion of Japanese companies' role in undermining international sanctions imposed in the wake of the Tiananmen incident, see INT'L LEAGUE FOR HUMAN RIGHTS, *BUSINESS AS USUAL . . . ? : THE INTERNATIONAL RESPONSE TO HUMAN RIGHTS VIOLATIONS IN CHINA* (1991).

¹⁶⁰ See *supra* note 120 and accompanying text.

not rising to the level of “pervasive violations of basic human rights”—do not contribute to violations, and instead help raise the level of enjoyment of basic rights in host countries. As noted in part II.B., Levi Strauss & Co. has effectively applied the latter criteria to elicit meaningful reforms in the employment practices of a number of business partners.¹⁶¹

Levi Strauss & Co.’s approach is based on the sound premise that a company’s leverage to promote human rights is maximized when it combines a credible threat that it will terminate business relations either in a country or with individual business partners with identifiable criteria for non-termination, new investment, or contractual arrangements. Critical to the success of such a policy is Levi Strauss & Co.’s determination to identify specific conditions that must be satisfied—whether by a potential business partner or a country—to qualify for investment or business contracts.

Levi Strauss & Co.’s adoption of standards governing both engagement with individual business partners and investment in countries is a sophisticated approach to the vexing issue whether a company should invest at all in a repressive country. The Levi Strauss & Co. policy moves in a constructive fashion away from the “all or nothing” approach that has long characterized public debate about transnational investors’ responsibilities *vis-a-vis* repressive governments. Total withdrawal from business and investment is reserved under this approach for countries where, in the company’s estimation, “pervasive violations of basic human rights” make it impossible for Levi Strauss & Co. to play a constructive human rights role by investing there. The two-track approach embodied in Levi Strauss & Co.’s policy clearly has the potential to maximize its leverage to promote constructive change, while allowing the company appropriate flexibility to respond appropriately and effectively to myriad variations in relevant conditions.

E. Tailoring Corporate Initiatives to the Host Country Situation

While the proposals advanced in previous sections are universally relevant, meaningful efforts to implement them will require that transnational investors adopt policies that are responsive to the peculiar problems of individual countries.¹⁶² With this in mind, we offer the fol-

¹⁶¹ See *supra* note 120.

¹⁶² The approach taken by Levi Strauss & Co. in implementing its ethical code exemplifies this recommendation. When the company decides to withdraw from a country that engages in “pervasive violations of basic human rights,” it identifies concrete human rights reforms that must be made before it will reverse its decision. Those criteria are based upon a detailed analysis by corporate staff

lowing recommendations for companies that invest in China.

1. Endorse and Adhere to China Code of Conduct

We believe that the human rights principles set forth in the code-of-conduct legislation described in part I.B.5 represent minimum standards for U.S. and other foreign companies operating in China. Accordingly, we urge companies voluntarily to adhere to those principles, regardless of whether the legislation is enacted into law. The effectiveness of corporate adherence to these principles would be maximized if companies publicly acknowledged their adherence.

We also believe that these principles would be most effective if they were adopted by the American Chambers of Commerce in Hong Kong, Beijing, and Shanghai and the Washington-based U.S.-China Business Council to govern the activities of their member companies in China. The endorsement of human rights principles by these organizations would carry crucial significance both within the business community itself and with the Chinese government. Further, their adoption by the above-named organizations would expand the impact of the principles, since membership in these organizations is not entirely coextensive with corporations covered by the code-of-conduct legislation (principally because of *de minimis* limitations on investments covered by the legislation and similar jurisdictional provisions).

2. Assure Compliance with Code-of-Conduct Through Monitoring by Professional Organizations

Each of the professional organizations noted under our first recommendation should establish a human rights committee to oversee implementation by member companies of the code of conduct, as well as other human rights activities by companies. In the latter regard, these committees should act in a ombudsman's role to provide advice and counsel to companies that encounter human rights problems in their operations or need help in reaching relevant Chinese officials to discuss human rights, and generally should act as a clearing house for information and sharing of relevant experiences among member companies.

Member companies should be required to file with the associations' human rights committees annual reports describing their compliance with the principles endorsed by each organization. These reports would in many cases be the same as those to be submitted to the State Depart-

of the chief human rights concerns in the relevant country. Similarly, Levi Strauss & Co. identifies concrete human rights goals that it will attempt to promote in countries where it maintains an investment despite human rights problems.

ment under the code-of-conduct bill described in part I.B.5. In addition, member companies should be encouraged to submit, on an ongoing basis, reports describing particular problems or successes encountered in the course of their efforts to promote human rights, whether or not relevant to specific principles set forth in a code of conduct. Such reports would enable the human rights committees to consolidate experience and establish a data base of precedents that could be drawn upon in assisting member companies to deal effectively with human rights issues in their China business activities.

3. Work for Release of Political Prisoners

As indicated in part I.B.5.(8), we believe that companies could play a particularly constructive role in securing the release of persons detained solely because of peaceful political activities. We recommend that foreign companies operating in China "adopt" the cases of political prisoners held in the regions in which the companies' China operations are most substantial. When, for example, senior executives of major U.S. investors visit China, they should raise these cases in the course of their meetings with high-level officials in Beijing.

A few examples of situations in which U.S. companies active in China could exert their influence suggests both the magnitude of human rights violations in the PRC and the considerable impact that the business community could have in addressing them. The U.S. automobile industry has been among the most active investors in the PRC, providing China with badly needed capital, technology and management expertise to upgrade the country's moribund vehicle production industry for both commercial and industrial use. The Chrysler Corporation, for example, has an important cooperative project in Changchun, Jilin Province, often referred to as the "Detroit of China." In that city, Tang Yuanjuan, an assistant engineer at an automobile plant, was sentenced to 20 years' imprisonment in November 1990 for "counterrevolution" as a result of his activities in support of the 1989 democracy movement.¹⁶³

General Motors has concluded a major investment project in Liaoning Province in northeast China, a province whose Lingyuan labor camp has been particularly notorious for the number of political prisoners held there and for its abysmal living and working conditions. One resident of the camp, Liu Gang, one of the 1989 student leaders, was reported to have had his arm broken by jail warders and to have been

¹⁶³ See AMNESTY INTERNATIONAL, PEOPLE'S REPUBLIC OF CHINA: CONTINUED PATTERNS OF HUMAN RIGHTS VIOLATIONS IN CHINA, AI Index ASA 17/32/92, at 11 (1992).

force-fed when he attempted to go on a hunger strike last November to protest conditions in the camp.

The area comprising Shanghai and neighboring Jiangsu province, in the heart of China's richest agricultural region, is home to numerous important U.S. investment ventures: Hoechst Celanese manufactures ingredients for cigarette filters in Nantong; McDonnell-Douglas engages in coproduction of aircraft in Shanghai; also in Shanghai, Squibb, S.C. Johnson, and Johnson & Johnson have operations producing pharmaceuticals, medical products and various other items, and Xerox has a major joint venture project; Sheraton, Holiday Inn and other major hotel companies play a key role as investors and/or managers of major tourist hotels in this heart of China's tourist industry. This list could be continued at length.

In this same area, prisoners are detained for the non-violent expression of political opinion and the exercise of other internationally-recognized human rights. To cite just a few examples, Ma Zhiqiang, a worker from Shanghai in his late 20s, was arrested in June 1989, reportedly for attempting to form an independent trade union during the Spring 1989 democracy movement. Ma was apparently tried and sentenced to a five-year term on charges of "counterrevolution."¹⁶⁴ More recently, Fu Shengi, who had previously served two terms in detention for political dissidence, was sent to "reeducation through labor" for three years on June 26, 1993, for his peaceful activities in support of other political dissidents in Shanghai.¹⁶⁵ One of the individuals Fu was accused of "agitating" is a worker currently being held in a police-run mental institution in Shanghai, having attempted to form an independent trade union.

In Nanjing, Jiangsu province, Wu Jianmin, a 31-year-old worker in the Nanjing Passenger Train Factory, was sentenced to 10 years' imprisonment in April 1991 for starting a "counterrevolutionary organization"—the Democratic United Front. Yang Tongyan, an employee of the Jiangsu Academy of Social Sciences, was sentenced to 10 years' imprisonment in 1991 for founding the China Democracy Party.

In fact, one need look no further than China's capital city to find numerous examples of cases where U.S. companies with large-scale operations could play an effective role. As the nerve center of the 1989 democracy movement, Beijing has an especially large population of citizens held in prisons or administrative detention centers on charges stemming from their exercising the rights of free expression and freedom of associa-

¹⁶⁴ See AMNESTY INTERNATIONAL, *TORTURE IN CHINA*, AI Index: ASA 17/5/92, at 32-33 (1992).

¹⁶⁵ S. CHINA MORNING POST, July 12, 1993, at 1.

tion. Many have been detained in the past year—long after the Tiananmen incident—for ongoing attempts to promote human rights and political change. In addition to names relatively well known abroad, such as dissident leaders Wang Juntao, Chen Ziming and Ren Wandong, Beijing's political prisoner population includes less known individuals such as Zhang Yafei and Chen Yanbin, student organizers currently serving 11- and 13-year sentences, respectively, for "counterrevolution." More recent additions to Beijing's population of detained political activists include Chen Wei, a former student at the Beijing University of Science and Engineering who was arrested (for the fourth time since June 1989) in May 1992 for his continuing involvement in underground pro-democracy activities, and Liao Jia'an, a graduate student at People's University in Beijing, who was active in study groups and publications that address democracy and political reform issues, and was recently tried for "counterrevolution."¹⁶⁶

Examples of companies with major investment projects in Beijing that could take up these and other cases in the course of their interactions with Beijing and central authorities include Hewlett Packard, with a large-scale cooperative computer operation in the capital, Babcock & Wilcox, with a major joint venture producing boilers, and the PepsiCo Corporation, whose participation in the several Kentucky Fried Chicken and Pizza Hut outlets in Beijing (and numerous other projects in different parts of China) give it a particularly high profile.

4. Include Human Rights Considerations in Feasibility Studies

We further recommend that U.S. and other foreign companies contemplating activities in China include human rights considerations in the feasibility studies generally required for investment projects. Just as there is now generally included in such studies by U.S. corporations an environmental impact report, so too there should be a human rights impact report. Thus, for example, in considering an investment project in the new special economic zone reportedly being created in Tibet to attract foreign investment,¹⁶⁷ a potential investor should consider such matters as the impact of the project on improving working conditions and economic opportunities for ethnic Tibetans and the possibility of prison labor being exploited for the venture. If a competing investment opportunity is offered to the same company in, for example, the Shenzhen Special Economic Zone, the company should consider not only

¹⁶⁶ See MAR. 1993 ASIA WATCH REPORT, *supra* note 5, at 13-15.

¹⁶⁷ *Tibetan Economic Zone Planned*, WALL ST. J., May 13, 1992, at A11.

the comparative economic advantages of each option, but also pertinent human rights considerations.

In general, potential investors should favor investment opportunities in regions that have a relatively positive human rights environment. Competition among different locations in China for foreign investment dollars is the order of the day, as reflected in a steady stream of local regulations seeking to offer competitive deals on land fees, labor policies, tax incentives, and the like. Foreign companies should advance this competition by adding a new consideration to the list—human rights.

Decisions to invest in highly repressive regions should be made only with a strong, and unambiguous, commitment to play a proactive role in promoting human rights improvements, and a willingness to pull out if such improvements do not materialize. For example, in an area like Tibet, a U.S. company should undertake an investment venture only if it is prepared to insist upon applying fair hiring practices that give an appropriate role to Tibetans in both management and skilled labor positions, providing training to Tibetans that is equal to that afforded Han Chinese staff, and making strong representations against any interference in peaceful activities of Tibetan staff, such as participating in study groups on Tibetan history and culture, and using the Tibetan language. Similarly, current and future investors in Tibet should use appropriate opportunities to request information about and release of those imprisoned for the peaceful advocacy of political views as well as for religious activities.

The point is that companies should consider, in advance of their decision on an investment project, the human rights conditions in the area where a project is contemplated and their potential ability to have a positive influence on such problems as may exist or arise. A decision *not* to make a particular investment would be appropriate if local human rights conditions were poor and the company's position in the contemplated venture or the economic importance of the project would not enable it to have a significant impact on human rights conditions. Similarly, a company should not undertake an investment in a highly repressive area if the benefit of the investment to the regime would likely outweigh any positive impact the project could have.

5. Assemble Data on Human Rights Conditions by Region

To facilitate investors' consideration of human rights factors, professional organizations, such as the American Chamber of Commerce in Hong Kong and the U.S.-China Business Council, that publish for their members periodic assessments of investment conditions in various parts of China should add human rights conditions to the factors they cur-

rently address—regulatory incentives, fiscal conditions, environmental issues, and the like. These human rights data should include such information as the nature of working conditions, discrimination against minority groups, and numbers of political prisoners in regions covered. Such reporting could draw on the extensive reporting of non-governmental human rights organizations and the State Department's annual human rights reports.

In addition, member companies should be asked to submit information concerning their observations about human rights conditions in areas where they operate. This information could significantly enhance the base of currently available information, as businesspersons employed full-time in China are in a position to develop greater familiarity with certain practices than representatives of organizations based outside China and of the U.S. government.

None of the proposals advanced in this section would require U.S. businesses or business associations to engage in activity that would violate Chinese law or policy. They would, however, go a long way toward assuring that U.S. business activities in China promote basic human rights values and do not in any way condone or participate in their violation.

CONCLUSION

A nascent corps of transnational businesses are establishing new mileposts for corporate responsibility in respect of human rights. Their initiatives have been shaped, above all, by the daunting challenges presented to foreign investors in China in the wake of the June 1989 clampdown by the PRC. But if their efforts have been largely propelled by Tiananmen, their impact will reach far beyond China. Indeed, the human rights policies adopted by these companies have already been extended beyond the PRC to the global market. And while only a small number of businesses have adopted comprehensive human rights policies, they already have succeeded in reframing the terms of debate within corporate boardrooms about the appropriate role of businesses in addressing human rights abroad. It is no small measure of their impact that the center of public debate has now shifted from the issue whether businesses should be expected to address human rights conditions in their overseas operations, to the question of what, precisely, their responsibilities are.

APPENDIX A

Human Rights Provisions of Levi Strauss & Co.'s "Business Partner Terms of Engagement"

Our concerns include the practices of individual business partners as well as the political and social issues in those countries where we might consider sourcing.

This defines Terms of Engagement which addresses issues that are substantially controllable by our individual business partners. We have defined business partners as contractors and suppliers who provide labor and/or material (including fabric, sundries, chemicals and/or stones) utilized in the manufacture and finishing of our products.

3. HEALTH & SAFETY

We will only utilize business partners who provide workers with a safe and healthy work environment. Business partners who provide residential facilities for their workers must provide safe and healthy facilities.

5. EMPLOYMENT PRACTICES

We will only do business with partners whose workers are in all cases present voluntarily, not put at risk of physical harm, fairly compensated, allowed the right of free association and not exploited in any way. In addition, the following specific guidelines will be followed.

* WAGES AND BENEFITS

We will only do business with partners who provide wages and benefits that comply with any applicable law or match the prevailing local manufacturing or finishing industry practices. We will also favor business partners who share our commitment to contribute to the betterment of community conditions.

* WORKING HOURS

While permitting flexibility in scheduling, we will identify prevailing local work hours and seek business partners who do not exceed them except for appropriately compensated overtime. While we favor partners who utilize less than sixty-hour work weeks, we will not use contractors who, on a regularly scheduled basis, require in excess of a sixty-hour week. Employees should be allowed one day off in seven days.

* CHILD LABOR

Use of child labor is not permissible. "Child" is defined as less than 14 years of age or younger than the compulsory age to be in school. We will not utilize partners who use child labor in any of their facilities. We

support the development of legitimate workplace apprenticeship programs for the educational benefit of younger people.

*** PRISON LABOR/FORCED LABOR**

We will not knowingly utilize prison or forced labor in contracting or subcontracting relationships in the manufacture of our products. We will not knowingly utilize or purchase materials from a business partner utilizing prison or forced labor.

*** DISCRIMINATION**

While we recognize and respect cultural differences, we believe that workers should be employed on the basis of their ability to do the job, rather than on the basis of personal characteristics or beliefs. We will favor business partners who share this value.

*** DISCIPLINARY PRACTICES**

We will not utilize business partners who use corporal punishment or other forms of mental or physical coercion.

APPENDIX B

Reebok International Ltd.'s "Human Rights Production Standards"

Reebok's devotion to human rights worldwide is a hallmark of our corporate culture. As a corporation in an ever-more global economy we will not be indifferent to the standards of our business partners around the world.

We believe that the incorporation of internationally recognized human rights standards into our business practice improves worker morale and results in a higher quality working environment and higher quality products.

In developing this policy, we have sought to use standards that are fair, that are appropriate to diverse cultures and that encourage workers to take pride in their work.

Non-Discrimination

Reebok will seek business partners that do not discriminate in hiring and employment practices on grounds of race, color, national origin, gender, religion, or political or other opinion.

Working hours/overtime

Reebok will seek business partners who do not require more than 60-hour work weeks on a regularly scheduled basis, except for appropriately compensated overtime in compliance with local laws, and we will favor business partners who use 48-hour work weeks as their maximum normal requirement.

Forced or Compulsory Labor

Reebok will not work with business partners that use forced or other compulsory labor, including labor that is required as a means of political coercion or as punishment for holding or for peacefully expressing political views. In the manufacture of its products, Reebok will not purchase materials that were produced by forced prison or other compulsory labor and will terminate business relationships with any sources found to utilize such labor.

Fair Wages

Reebok will seek business partners who share our commitment to the betterment of wage and benefits levels that address the basic needs of workers and their families so far as possible and appropriate in light of national practices and conditions. Reebok will not select business partners that pay less than the minimum wage required by local law or that pay less than prevailing local industry practices (whichever is higher).

Child Labor

Reebok will not work with business partners that use child labor. The term "child" generally refers to a person who is less than 14 years of age, or younger than the age of completing compulsory education if that age is higher than 14. In countries where the law defines "child" to include individuals who are older than 14, Reebok will apply that definition.

Freedom of Association

Reebok will seek business partners that share its commitment to the rights of employees to establish and join organizations of their own choosing. Reebok will seek to assure that no employee is penalized because of his or her non-violent exercise of this right. Reebok recognizes and respects the right of all employees to organize and bargain collectively.

Safe and Healthy Work Environment

Reebok will seek business partners that strive to assure employees a safe and healthy workplace and that do not expose workers to hazardous conditions.

APPENDIX C

Human Rights Provisions of Phillips-Van Heusen Policy "A Shared Commitment: Requirements for Suppliers, Contractors, Business Partners"

"Guidelines for Vendors"

. . . The following guidelines address issues which are substantially controllable by our vendors:

ETHICAL STANDARDS.

We will not do business with any vendor who discriminates based on race, gender or religion. We will not do business with any vendor who violates the legal and moral rights of employees in any way.

HEALTH AND SAFETY REQUIREMENTS

We will only do business with vendors who provide employees with a safe and healthy work environment. Vendors should make a responsible contribution to the health care needs of their employees.

"Employment Practices"

We will not do business with any vendor who fails to consistently treat employees fairly with regard to wages, benefits and working conditions. Specifically, the following guidelines apply: We will only do business with vendors who provide reasonable wages and benefits that match or exceed the prevailing local industry standard.

While permitting flexibility in scheduling, we will only do business with vendors who do not exceed prevailing local work hours and who appropriately compensate overtime. No employee should be scheduled for more than sixty hours of work per week, and we will favor vendors who utilize work weeks of less than sixty hours. Employees should be allowed at least one day off per seven day week.

We will not be associated with any vendor who uses any form of mental or physical coercion. We will not do business with any vendor who utilizes prison or forced labor.

We will not do business with any vendor who denies their employees appropriate access to education, health care, religious observance or family obligations.

We will favor vendors who share our commitment to contribute to the betterment of the communities in which they operate.